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Supreme Court of the United States

OCTOBER TERM, 1963.

No. 593

PEORIA AND PEKIN UNION RAILWAY COMPANY, a corporation, ILLINOIS CENTRAL RAILROAD COMPANY, a corporation, PEORIA AND EASTERN RAILWAY COMPANY, a corporation, CHICAGO AND ILLINOIS MIDLAND RAILWAY COMPANY, a corporation, and UNITED STATES TRUST COMPANY OF NEW YORK, as Trustee of Peoria and Pekin Union Railway Company First Mortgage dated January 1, 1950, *Petitioners*,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Petitioners,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners, Peoria and Pekin Union Railway Company ("P&PU"), Illinois Central Railroad Company (Illinois Central"), Peoria and Eastern Railway Company ("P&E"), Chicago and Illinois Midland Railway Company ("Illinois Midland") and United States Trust Company of New York, as Trustee of Peoria and Pekin Union Railway Company First Mortgage dated January 1, 1950 ("trustee") pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the

Seventh Circuit, entered May 14, 1963. Rehearing was denied August 5, 1963. The judgment affirmed a judgment of the United States District Court for the Southern District of Illinois, Northern Division, entered February 19, 1962.

The action, as framed on appeal below, involved a federal question, respondent Chicago and North Western Railway Company ("C&NW") seeking an order restraining P&PU from enforcing its exclusive right to perform terminal services for C&NW in and around Peoria, Illinois, granted by certain terms and conditions of a long-term contract between P&PU and C&NW, on the ground that these provisions constituted an arrangement for the pooling or division of railroad traffic or service in violation of both the Interstate Commerce Act and antitrust law.

OPINION BELOW.

The District Court's original opinion (Joint Appendix below 301), granting summary judgment to C&NW, both on its amendment to the complaint and on the amended counterclaim of P&PU and trustee, is reported in 201 F. Supp. 241. The same court's memorandum opinion (Joint Appendix 368), reinstating P&PU's counterclaim, but otherwise denying petitioners' motions to alter, amend and vacate, is not reported. The opinion of the Court of Appeals and its order denying rehearing (Appendix 1a, 12a) are reported in 319 F. 2d 117.

JURISDICTION.

The order of the United States Court of Appeals for the Seventh Circuit denying rehearing was entered August 5, 1963. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. P&PU performs for C&NW terminal switching services in and around Peoria, Illinois, under a contract (which runs until 1981) governing the joint use of P&PU's tracks and terminal facilities. Two of the terms or conditions of this contract reserve to P&PU the exclusive right to perform C&NW's switching in and around Peoria. Section 5(1) of the Commerce Act forbids the pooling or division of competitive traffic or service without the approval of the Interstate Commerce Commission, and gives to the Commission jurisdiction to approve, modify or disapprove such pooling arrangements. Transactions approved under section 5 are exempted by section 5(11) from antitrust and other law. The first question presented is whether the Commission has exclusive jurisdiction, in the first instance, to determine whether the contested provisions of P&PU's contract constitute unlawful pooling of traffic or service between carriers.

2. Section 5(2)(a)(ii) of the Commerce Act in effect forbids the acquisition of trackage rights and joint use of lines and terminals without Commission approval. Exclusive-dealing provisions, similar to those in P&PU's contract, are common in agreements for joint use of terminal facilities which have been approved by the Commission under section 5(2)(a)(ii). The contract at Peoria was so approved by the Commission in 1946. Such provisions have never before been held to constitute pooling arrangements within section 5(1). The decision below, by casting doubt upon the validity of a common method of operating rail terminals on a construction of the statute admitted by the court to be without direct precedent (319 F. 2d at 121, Appendix 7a), presents an important federal question which has not been, but should be decided by this Court. The second question presented is whether an exclusive-

dealing agreement between a terminal railroad and a line-haul railroad constitutes pooling or division of traffic or service within the meaning of section 5(1) of the Interstate Commerce Act.

3. C&NW sought and obtained approval by the Commission of extended performance of the contract under section 5(2)(a)(ii). The Commission was aware of the exclusive-dealing arrangement and found that the terms and conditions of extension were just and reasonable and consistent with the public interest. The third question presented is whether in these circumstances the same private party that obtained approval should be allowed to repudiate the transaction in collateral proceedings.

4. The exclusive-dealing provision prevents wasteful duplication of terminal facilities in a congested terminal area and improves the efficiency and economy of P&PU's terminal services. The court below held that this provision constituted a restraint of competition, illegal *per se*, although there was no evidence that elimination of this provision would enhance competition or lower the over-all cost of terminal operations at Peoria. The fourth question presented is whether under these circumstances the exclusive-dealing provision constitutes *per se* a violation of an antitrust law.

STATUTES INVOLVED.

The statute primarily involved is the Interstate Commerce Act, Act of February 4, 1887, 24 Stat. 379, as amended, 49 U. S. C. §§ 1 *et seq.* Portions of this Act specifically involved include sections 5(1), 5(2), 5(8), 5(9), 5(11), 8, 9, and 13(2), 49 U. S. C. §§ 5(1), 5(2), 5(8), 5(9), 5(11), 8, 9, 13(2). Other statutes which are necessarily involved because of their relation to this Act include section 16 of the Clayton Act, Act of October 15, 1914, 38 Stat. 737, 15 U. S. C. § 26, and section 2325 of the Judiciary Act, 28

U. S. C. § 2325. The decision below also invoked section 1 (and apparently section 2) of the Sherman Act, Act of July 2, 1890, 26 Stat. 209, as amended, 15 U. S. C. §§ 1, 2. Provisions of these statutes relevant to this case are set forth in the Appendix, page 13a *et seq.*

STATEMENT OF THE CASE.

Peoria, after Chicago and St. Louis, is the largest rail freight gateway in the United States. P&PU is the consolidated terminal railroad serving this gateway. It owns 145 miles of track and other essential terminal facilities. It connects with and performs various terminal services for 13 line-haul carriers and directly or indirectly serves over 300 industries in or around Peoria (Joint Appendix 166, 167). With respect to Peoria, C&NW is a north-south carrier, whose main line runs immediately west of Peoria but does not enter Peoria. C&NW owns trackage between a junction with its main line due west of Peoria and a junction with P&PU within the Adams Street Yards, located in the south-west corner of Peoria (Joint Appendix 108). C&NW directly serves a few industries in and around Peoria, but serves only one industry jointly with P&PU (Joint Appendix 101).

In 1911 C&NW and P&PU executed a comprehensive agreement setting forth the terms and conditions under which C&NW was to enjoy joint use, together with other line-haul carriers serving Peoria, of P&PU's tracks and terminal facilities and services. As will be described more fully below, this is the agreement at issue herein.

This contract (set forth at Joint Appendix 175-195) describes the properties of P&PU and the terminal services to be performed by it (Preamble and Paragraphs First through Fifth, Joint Appendix 175-179), imposes upon C&NW a flat annual fee and sets up formulae for the

assessment of "reasonable charges" for P&PU's terminal services and a "just proportion" of the "proper joint expenses" incurred by P&PU on behalf of its joint users (Paragraphs 1 through 6, Joint Appendix 179-185). Finally it contains certain covenants outlining the respective responsibilities of the parties (Paragraphs (AA) through (NN), Joint Appendix 185 through 195).

The most important provision involved in this case is Paragraph Fourth, which obligates P&PU to serve C&NW "promptly and efficiently and without discrimination or partiality." It forbids interference by P&PU in "the divisions of passenger or freight traffic over any of the railroads" it serves. Finally, Paragraph Fourth "expressly reserved" to P&PU "the right" to switch for C&NW's account, "all loaded and empty freight and other cars of [C&NW] intended for transfer" to and from industries located on P&PU's line, and to and from other line-haul carriers connecting with P&PU (Joint Appendix 177-178). There is a similar exclusive delegation of switching obligations in Paragraph (AA) (Joint Appendix 185). Although the 1911 contract expired in 1921, the parties continued to operate under its terms and conditions informally until 1946.

P&PU is jointly owned by six of the line-haul carriers it serves ("the proprietary lines"), in the following proportions:

Illinois Central (indirectly)	38.53%
P&E	17.30
New York, Chicago and St. Louis Railroad Company ("Nickel Plate")	15.00
C&NW	12.50
Pennsylvania Railroad Company ("Pennsylvania")	8.34
Illinois Midland	8.33
	100.00%

In 1946, an opportunity arose to refinance P&PU's bonds on favorable terms. As P&PU's contracts with the proprietary lines would be used to secure the new bonds, C&NW and P&PU agreed upon a formal agreement extending the 1911 contract until 1981 on the same terms and conditions as before.

C&NW submitted this proposed extension agreement to the Commission for approval under Section 5(2) of the Commerce Act, which governs "joint use, of any railroad line or lines . . .and terminals incidental thereto." C&NW attached as exhibits to its application, a copy of the 1911 contract and an opinion of its counsel "that the proposed transaction meets with the requirements of the law and will be legally authorized and valid, if approved by the Commission" (Joint Appendix 235, 238).

The Commission, Division Four, held hearings and, in *Chicago & N. W. Ry. Co.—Joint Use*, Interstate Commerce Commission Finance Docket No. 15354 (1946)(Joint Appendix 88), found that P&PU performed "The terminal service of making up the trains and distributing the cars on all of this business," referring to C&NW's freight traffic into and out of Peoria; that "The extension agreement will be on the same terms and conditions as those now in effect"; and that "It is important to [C&NW] and to the shipping public that the present service at Peoria be continued" (Joint Appendix 90, 91). The Commission, Division Four, concluded (Joint Appendix 91-92):

> [W]e find that extension of the agreement dated December 1, 1911, under which [C&NW] jointly uses the rails, tracks and facilities of [P&PU] to and including February 1, 1981, described herein, is a transaction within the scope of Section 5(2) of the Interstate Commerce Act, as amended, that the terms and conditions proposed are just and reasonable, and that the transaction will be consistent with the public interest.

In a companion case, referred to in Finance Docket No. 15354, the Commission under section 5(2) authorized extension of P&E's contract on a similar record and identical findings, *Peoria & Eastern Ry. Co.—Joint Use*, Interstate Commerce Commission Finance Docket No. 15220 (1946). P&PU's other contracts did not require renewal and therefore did not require approval under section 5(2).

P&PU continued to perform all of C&NW's switching until 1957, when C&NW constructed 519.8 feet of crossover track between its main line and the main line of Toledo, Peoria & Western Railroad Company ("TP&W") at a location designated as Sommer, some four miles south of the city limits of Peoria, and there began to interchange traffic directly with TP&W, in lieu of using P&PU's intermediate switching services (Joint Appendix 97).

When P&PU protested to C&NW that direct interchange at Sommer violated its rights under the 1911 contract as extended, C&NW filed a declaratory judgment action, based on diversity of citizenship, seeking an order that its operations at Sommer did not violate the exclusive-dealing provision of its contract with P&PU (Joint Appendix 16). C&NW's complaint named all of the other proprietary lines as defendants. P&PU counterclaimed for damages in the form of an accounting and injunctive relief.

Although the arrangement at Sommer involved the acquisition of mutual trackage rights, C&NW and TP&W had not obtained Commission approval under Section 5(2)(a)(ii), which governs such transactions. In response to a Commission inquiry, they filed an application and obtained approval under that section of direct interchange, but only to a limited extent, *Toledo, P. & W. Ry. Co.—Trackage Acquisition*, Interstate Commerce Commission Finance Docket No. 19922 (1958) (Joint Appendix 96). For some of C&NW's traffic the Commission found that use of P&PU's service is "wasteful and inadequate transportation and is

unwarranted" (Joint Appendix 113). But for the remainder, which it found constituted "the predominant flow of present traffic," C&NW was ordered to continue to use P&PU (Joint Appendix 115).

In 1961 C&NW filed an amendment to the complaint, enlarging the scope of the declaratory relief sought to encompass the effect of C&NW's acquisition of The Minneapolis and St. Louis Railway Company ("M&StL") and operation of that railroad as a division of C&NW upon P&PU's rights under the contract. P&PU's amended counterclaim asserted, among other things, that C&NW was using M&StL's direct interchange connections to divert additional switching traffic from P&PU (see Joint Appendix 171).

Not until 1961 did C&NW question the validity of the exclusive provision. Then, in the prayer of the amendment to its complaint, it sought injunctive relief against enforcement of the exclusive provisions (and other provisions which had not been invoked by P&PU). Thereupon, C&NW filed a motion for summary judgment, conceding solely for that purpose that direct interchange at Sommer and via M&StL would violate P&PU's rights under the contract.

Petitioners Illinois Central, P&E, Illinois Midland and trustee all join P&PU in this petition, although their respective interests differ slightly. Trustee, which intervened by leave of the District Court to protect the validity of the contract assigned as security for the bonds, and Illinois Central support P&PU on all issues. P&E and Illinois Midland uphold the validity of the contested provisions, but adopt a strictly neutral attitude as to the breach of contract issue raised by C&NW's original complaint, which would be revived by reversal of the judgment below.

The District Court, granting summary judgment for C&NW, held (201 F. Supp. at 253, Joint Appendix 323):

> the 1911 contract, as extended, is a pooling agreement within the meaning of Section 5(1) to the extent that it purports to reserve to P&PU all terminal and intermediate switching service within the Peoria vicinity . . .

It held further, that because the Commission had never properly approved it, the 1911 contract "[t]o the extent hereinabove indicated" violated Section 5(1) of the Commerce Act and "to the same extent" violated Section 1 of the Sherman Act (201 F. Supp. at 254, Joint Appendix 324). The Court of Appeals affirmed both holdings of the District Court. Its opinion substantially follows that of the District Court.

REASONS FOR GRANTING THE WRIT.

I.

THE DECISION BELOW FINDING AND GRANTING INJUNCTIVE RELIEF FOR A VIOLATION OF THE COMMERCE ACT INVADED THE EXCLUSIVE JURISDICTION OF THE COMMISSION TO DETERMINE THIS QUESTION AND ENTER APPROPRIATE ORDERS AND IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The court below conceded that if the exclusive-dealing provision of the contract constituted a pooling agreement, the Commission could approve, modify or disapprove the arrangement under the authority delegated to it by section 5(1) of the Interstate Commerce Act, which relates to agreements between competitive carriers "for the pooling or division of traffic, or of service, or of gross or net earnings, or of any portion thereof . . ." But it rejected petitioners' argument that the question of pooling is a question reserved in the first instance exclusively for the Commission by the Commerce Act.*

The decision below is in direct and total conflict with the principle of the decision of this court in *Pan American World Airways* v. *United States*, 371 U. S. 296 (1963) (*"Panagra"*).

In the *Panagra* case, the United States, at the request of the Civil Aeronautics Board, sought to restrain (1) a

* The District Court specifically rejected petitioners' suggestion that the question of pooling be referred to the commission for determination in the first instance (Joint Appendix 371). Petitioners raised this point below, in their oral argument and in their Petition for Rehearing, which the court below denied without discussion. In any event, this important question has been raised *sua sponte* by this court, *United States* v. *Western Pac. R. Co.*, 352 U. S. 59, 63 (1956).

territorial division of the South American market by Pan American and Panagra, which it jointly owned with W. R. Grace Co., (2) an alleged conspiracy betwen Pan American and Grace to monopolize the traffic between South America and the eastern seaboard of the United States and (3) a unilateral restraint by Pan American upon Panagra's efforts to obtain a CAB certificate over routes served by Pan American.

The District Court (193 F. Supp. 18) found for defendants on the first two issues and for the Government on the third, and ordered Pan American to divest itself of Panagra's stock. Both the United States and Pan American appealed directly to this court, which reversed all three holdings and remanded the case with instructions to dismiss the complaint for lack of jurisdiction.

Panagra is a case on all fours with this case. Although different statutes are involved, they are closely related and equally pervasive, as both the majority and dissenting opinions of this court point out (see 371 U. S. at 310 and 371 U. S. at 323).

The Federal Aviation Act, involved in *Panagra*, and the Interstate Commerce Act, involved herein, apply to "common carriers" and the relevant portions involved in the two cases cover the same subjects: "consolidations, mergers, purchases, leases, operating contracts, acquisition of control of [a] carrier, . . . interlocking relations" and "pooling and other like arrangements" (371 U. S. at 304). Compare sections 408, 409 and 412 of the Aviation Act, 49 U. S. C. §§ 1378, 1379 and 1382, with sections 5(2), 5(4) and 5(1), respectively, of the Commerce Act, 49 U. S. C. §§ 5(2), 5(4) and 5(1). Both the Civil Aeronautics Board and the Commission, by authorizing performance of the transaction upon appropriate findings, are empowered to relieve any person participating therein, "from the op-

eration of the antitrust laws", cf. section 414 of the Aviation Act, 49 U. S. C. § 1384, and section 5(11) of the Commerce Act, 49 U. S. C. § 5(11). Both agencies are authorized to initiate investigations into violations of these provisions, and enter appropriate orders to compel compliance with the Act. Compare sections 408(e) and 1002(b) and (c) of the Aviation Act, 49 U. S. C. §§ 1378 (e) and 1482 (b) and (c) and sections 5(7) and 13(2) of the Commerce Act, 49 U. S. C. §§ 5(7) and 13(2). Congress has gone even further with respect to the Commission by denying private injunctive relief against antitrust violations "in respect of any matter subject to the regulation, supervision, or other jurisdiction" of the Commission, 15 U. S. C. § 26.

Finally, both agencies are entrusted with coordination of the regulatory scheme with military and other national interest considerations peculiarly suited for the constant and expert consideration of these agencies rather than the intermittent decisions of a court.

The CAB's power over "unfair methods of competition," delegated by section 411, 49 U. S. C. § 1381, may have no exact counterpart in the Commerce Act, but this does not weaken the force of this court's analysis of the extent of supersession. There is no contention herein that the Commission's jurisdiction does not extend to the provisions of the contract under attack, either under section 5(1) or section 5(2).

In *Panagra*, this court held that the regulatory act had displaced antitrust law with respect to the transactions attacked in the complaint. What this court said (371 U. S. at 309) with reference to the CAB's authority over division of service areas or allocation of routes applies with equal force to the Commission's authority over the alleged pooling agreement in the instant case:

> Whether or not transactions of that character meet the standards of competition and monopoly provided by the Act is peculiarly a question for the Board, subject of course to judicial review as provided by [the Act].

In the context of the facts of the instant case, these considerations apply with special force. Whether or not the exclusive-dealing provision is in the "public interest" and (assuming that it is a pooling arrangement) whether it will "unduly restrain competition" as that term is employed in the Commerce Act ought to be decided by the Commission, not a court.

The guide lines which the Commission would employ may not be familiar to a court steeped in common law anti-trust doctrine. "Competition" was a magic word to the court below (cf. 319 F. 2d at 122; Appendix 9a) but the Commission wasn't looking at the same thing at all in approving an exclusive-dealing clause in *Express Contract, 1939*, 275 I.C.C. 739 (1950). There the Commission acknowledged that the Railway Express Agency's exclusive right might restrain competition between railroads, but found that it enhanced the competitive power of railroads against other modes of transportation (275 I. C. C. at 745). This is the "competition" which has concerned the Commission for many years. Cf. "Immediate Relief for Railroads," Report of the "Committee of Three," House Document No. 583, 75th Cong., 3d Sess. (1938), p. 40.

Similarly, consolidation of terminal facilities which by its nature places all the line-haul carriers on an equal competitive footing with each other, has been consistently favored by Congress and the Commission, not only because it enhances the railroad carriers' intermodal competitive position by eliminating wasteful duplication of terminal facilities and, on the whole, multiplicity of handling, but because it also reduces the physical hazards inherent in a

multitude of railroad lines running through congested areas, *Consolidation of Railroads*, 159 I. C. C. 522 (1929), Annual Report of the Commission for 1947, page 41.

In this context, the primary function of the exclusive-dealing clause is not anticompetitive, but is related to encouraging the operating efficiency and financial integrity of the terminal railroad, for the benefit of its users. Whether the terminal operations are capitalized by contributions, or by issuance of bonds secured by the operating contracts or guaranteed by the proprietary lines, substantial diversion of revenue from the terminal railroad will impair the efficiency of its operations and may eventually threaten its financial integrity.

The court below ignored petitioners' argument that C&NW's operations at Sommer might well have increased the overall cost of terminal operations at Peoria, so that C&NW has benefited only at the expense of its co-stockholders and their customers. The Commission has denied requests for direct interchange in lieu of intermediate switching where it found that allowing it in one case might open the door to other requests with the result "that orderly operation of the terminal would be seriously hampered." *Carload Traffic Between Industries in the Chicago District*, 174 I. C. C. 111, 115 (1931).

Petitioners are not arguing that the separate questions of whether the direct interchange violates the 1911 contract and the question of damages if it does, should be referred to the Commission. But the question whether or not exclusive dealing agreements produce, in and by themselves, a pooling arrangement within section 5(1) and the necessary correlative question whether the performance of these clauses should be prohibited or approved and thereby exempted from antitrust prohibitions, have been left by Congress to the Commission in the first instance so

that the District Court lacked jurisdiction over the subject matter of the amendment to the complaint.

The decision below is also in conflict with other applicable decisions of this court, which were confirmed and reinforced by *Panagra*. In *Terminal Warehouse Co.* v. *Pennsylvania R. Co.*, 297 U. S. 500 (1936), this court denied treble damage relief for acts which violated both the Commerce Act and antitrust law because the "remedy under the Commerce Act . . . is exclusive," 297 U. S. at 511. If we look at the Commerce Act, there is no provision for private injunctive relief. To the contrary, section 5(8), 49 U. S. C. § 5(8), restricts the jurisdiction of the courts "to issue . . . writs of injunction" restraining a violation of section 5(1) to suits brought by the Commission. Sections 8 and 9, 49 U. S. C. §§ 8, 9, which speak of reparations, offer no support for the decision below.

Other decisions of this Court with which the decision below is in conflict include *Far East Conference* v. *United States*, 342 U. S. 570 (1952), *Thompson* v. *Texas Mexican R. Co.*, 328 U. S. 134, 147 (1946) and *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U. S. 474 (1932).

If the fact that determination of the pooling issue so belatedly raised by C&NW had been exclusively delegated to the Commission was not enough to stay the hand of the District Court, the fact that the Commission had approved extension of the 1911 contract under section 5(2)(a)(ii) in 1946 should have been. When joint use agreements are presented for approval, the Commission must make certain findings. It must find that "subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of [section 5(2)(a)] and will be consistent with the public interest," section 5(2)(b). It must also consider, the "effect of the proposed transaction upon adequate transportation service to the public," section 5(2)(c).

fall, but the District Court found "to some extent" every kind of *per se* violation was involved (201 F. Supp. at 254, Joint Appendix 325). This scatter gun technique masks the true novelty of the decision below, which can best be demonstrated by specific analysis of each point.*

A. Tying.

The District Court characterized P&PU's contract as an "all or nothing" proposition to C&NW (201 F. Supp. at 255, Joint Appendix 326). In defining illegal "tying" this court, in *Northern Pacific R. Co.* v. *United States*, 356 U. S. 1, 6n (1958), states:

> Of course, where the buyer is free to take either product by itself there is no tying problem even though the seller may also offer the two items as a unit at a single price.

Long ago, the Commission found that P&PU was a common carrier obliged "to perform . . . . those services which [the user desires P&PU] to perform and no others, and to be paid for such as it performs and no others," *St. Louis, S. & P. R. Co.* v. *Peoria & P. U. Ry. Co.*, 26 I. C. C. 226, 233 (1913). At any time between 1921 and 1946 C&NW could have elected to be served under P&PU's published tariffs. Instead, for business reasons, which are set forth in Finance Docket No. 15354 (Joint Appendix 235), it elected to execute the extension agreement. If the essence of tying is the seller's power to compel, the complete absence of this element in 1946 refutes the finding of the court below.

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*The antitrust issue passed on below will be mooted if this court finds that the Commerce Act applies to the exclusive-dealing provision and supersedes antitrust law as to its validity. See Part I. However, if this Court finds that the Commission lacks jurisdiction under either sections 5(1) or 5(2) over the exclusive provisions, an antitrust issue could be raised. It is on the latter assumption that the argument in this part is made.

B. Monopoly.

The court below held that the exclusive-dealing provisions of the contract between C&NW and P&PU "would carve out for P&PU a monopoly of almost all switching traffic in or passing through one of the three great rail gateways in 'this country'" (319 F. 2d at 122, Appendix 10a). This appears to expand the relevant market to all rail switching, but reference to P&PU's "market share" by the District Court (201 F. 2d at 256, Joint Appendix 328) was faulty, because it omitted the substantial volume of direct interchange conducted by line-haul carriers not served under contract. Even in the absence of accurate figures, P&PU's share is below the 90 per cent figure deemed significant by Judge Hand in *United States* v. *Aluminum Co. of America*, 148 F. 2d 116, 424 (2d Cir. 1945). Petitioners contend that the relevant market must include traffic handled by the highly-competitive alternate modes of transportation. This is the Commission's own analysis, cf. *Express Contract, 1929*, 275 I. C. C. 739, 745 (1950). Measured by this scale, P&PU's share is even lower.

More important than this omission, however, is the failure of the court below to point out how the exclusive-dealing provisions give P&PU an unlawful monopoly. While P&PU may handle most of the switching at Peoria, none of the evils of monopoly are present: P&PU cannot choose those it will serve, *St. Louis, S. & P. Co.* v. *Peoria & P. U. Ry. Co.*, 26 I. C. C. at 233; it cannot discriminate between those it does serve, and its rates must be just and reasonable, cf. *Rates, Regulations and Practices of Peoria & P. U. Ry. Co.*, 93 I. C. C. 3 (1924), 115 I. C. C. 469 and 118 I. C. C. 127 (1926). Where the public interest requires, the Commission can authorize breach of the exclusive-dealing provision, cf. *Toledo, P. & W. R. Co.—Trackage Acquisition*, Finance Docket No. 19922 (1958). Of course, while such an

order will take away the right to injunctive relief, P&PU's remedy in damages remains, *Gulf, M. & O. R. Co.* v. *Illinois Central R. Co.*, 225 F. 2d 816 (5th Cir. 1955). How can P&PU, which is owned by its users and is fully regulated by the Commission, be labeled an unlawful "monopolist"?*

C. Market Division.

The District Court labeled the contract as an agreement between "competitors" to divide a market. The agreement provides, however, that P&PU shall perform certain services for C&NW which C&NW might otherwise perform for itself. Petitioners have already discussed the fallacious "competition" finding in Part II(C) of this petition, and will not repeat the argument, except to reiterate that the only "competition" found was for C&NW's switching requirements, in contrast to C&NW's line-haul traffic, for which P&PU does not compete (Joint Appendix 278). Inasmuch as market division agreements, cf. *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593 (1951) and *United States* v. *Addyston Pipe & Steel Co.*, 175 U. S. 211 (1899), cited by the District Court (201 F. Supp. at 254, Joint Appendix 325), resemble classic pooling arrangements within section 5(1) of the Commerce Act, the discussion in Part II(B) of this petition also applies here.

Antitrust law application depends upon substantial injury to "competition" not mere injury to a competitor, real or potential. The court below, contenting itself with affixing the *per se* label, made no analysis of the effect upon railroad competition of the exclusive-switching arrange-

*The District Court also found "price-fixing" in Paragraph (FF) (201 F. Supp. at 254, Joint Appendix 325; cf. ¶6(b) of its Judgment Joint Appendix 332). This provision was not involved in the controversy over direct interchange and is irrelevant to any issue in the case. *Kelly* v. *Kosuga*, 358 U. S. 516 (1959) governs this aspect of the decision below.

ment. The vice of the decision below is that it substitutes characterization for analysis of "the economic and business stuff out of which these arrangements emerge" and of "the actual impact of these arrangements on competition," *White Motor Co.* v. *United States*, 372 U. S. 253, 263 (1963). Some of the relevant considerations in assessing a long-term exclusive-dealing arrangement entered into by a public utility are set forth in *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320, 334 (1961). Viewed in context, the exclusive-switching arrangement benefits P&PU, C&NW and the railroad industry.

The exclusive provisions benefit C&NW, viewing the transaction as of 1946, in three ways: (1) because P&PU would perform the services, C&NW was spared the capital investment in trackage and in terminal equipment and facilities at Peoria that would be required to switch for its own account, (2) because P&PU would also handle all the switching for the other proprietary lines and thereby achieve real economies of size, the average per-car cost of all switching to C&NW would be lower than if C&NW were to switch entirely for itself, and because it would be assured of steady revenues, P&PU would be encouraged to invest in modern, efficient equipment and facilities, thus generating additional economies of operation and (3) because the contract would secure the new bond issue, there would be no thought of C&NW guaranteeing these bonds, (as has been done at other terminals, cf. *Southern Ry. Co.—Joint Use*, Finance Docket No. 21421 (1961)). The aggregate savings to P&PU's rail carrier users, both in avoided capital investment and in lower operating costs, could be expected to help them to better meet the fierce competition for the shipper's dollars offered by other modes of transportation.

D. Exclusive-Dealing.

Having stripped away the labels, "tying," "monopoly," "market division," we see that the court below is really saying that the exclusive-dealing arrangement is illegal *per se*. No court has as yet gone so far, cf. *United States* v. *Penn-Olin Chemical Co.*, 217 F. Supp. at 135. This holding is in fundamental conflict with the careful discussion by this court in *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. at 327 and important *dictum* in *Yellow Cab Co.* v. *United States*, 332 U. S. 218, 229 (1947):

> It is true, of course, that exclusive contracts for the transportation service in question are not illegal.

Accord, *Parmelee Transp. Co.* v. *Keeshin*, 292 F. 2d 794, 803 (7th Cir. 1961).

The first error of the decision below is that its definition of the relevant market is confined to C&NW's switching requirements. The proper test would include the freight traffic carried by all modes of transportation at Peoria. The second error is to confine analysis to the effect of the contract upon C&NW, a single purported "competitor," rather than to consider its effect upon intermodal competition. Against this background the aggregate benefit of the exclusive-dealing arrangement to the rail carriers served by P&PU and thereby to the shipping public becomes quite clear.

The decision below that P&PU's exclusive right to perform C&NW's terminal switching (subject to the Commission's overriding power to authorize direct interchange) was illegal *per se* introduces a new concept of *per se* illegality and should be reviewed by this court.

CONCLUSION.

Each of the several issues presented by the decision below is believed to involve a question, respectively, of judicial administration, administrative law, or antitrust law, of such importance that it should be settled by this court. Additionally, the decision on each issue is in conflict with applicable decisions and important principles laid down by this court. It is urged accordingly that a writ of certiorari to review the decree of the court below be granted.

Respectfully submitted,

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APPENDIX.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

SEPTEMBER TERM 1962—APRIL SESSION 1963
Nos. 13927, 13928, 13929, 13930 and 13931

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation,
Plaintiff-Counter-Defendant-Appellee,
No. 13927 v.
PEORIA AND PEKIN UNION RAILWAY COMPANY and ILLINOIS CENTRAL RAILROAD COMPANY,
Defendants-Counterclaimant-Appellants.
CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation,
Plaintiff-Counter-Defendant-Appellee,
No. 13928 v.
UNITED STATES TRUST COMPANY OF NEW YORK, as Trustee,
Intervenor-Defendant and Counterclaimant-Appellant.
CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation,
Plaintiff-Counter-Defendant-Appellee,
No. 13929 v.
CHICAGO AND ILLINOIS MIDLAND RAILWAY COMPANY,
Defendant-Appellant.
CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation,
Plaintiff-Counter-Defendant-Appellee,
No. 13930 v.
PEORIA AND EASTERN RAILWAY COMPANY,
Defendant-Appellant.
CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation,
Plaintiff-Counter-Defendant-Appellee,
No. 13931 v.
THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY,
Defendant-Appellant.

Appeals from the United States District Court for the Southern District of Illinois, Northern Division.

May 14, 1963

(Opinion is reported in 319 Fed. 2d 117.)

Before DUFFY, CASTLE and SWYGERT, *Circuit Judges.*

DUFFY, *Circuit Judge.* Plaintiff, Chicago and North Western Railway Company (North Western) filed this suit for a declaratory judgment against Peoria and Pekin Union Railway Company (P&PU), Illinois Central Railroad Company (Illinois Central), the Peoria and Eastern Railway Company, the New York, Chicago and St. Louis Railroad Company (Nickel Plate), and the Pennsylvania Railroad Company. The United States Trust Company of New York (Trustee) as the trustee under a first mortgage executed by defendant P&PU to secure a bond issue, was allowed to intervene as a defendant and counterclaimant.

This appeal involves the validity of a contract entered into on December 1, 1911 between North Western and P&PU for the use by North Western of P&PU's tracks and facilities in and near Peoria, Illinois, and for switching and terminal services by P&PU for North Western. In 1946, this contract was extended to February 1, 1981.

In its original complaint filed in 1957, North Western alleged it had begun direct interchange with Toledo, Peoria and Western Railroad Company (TP&W) at Sommer, which is located in the vicinity of Peoria, Illinois, and that P&PU had objected and claimed that such operations violated North Western's contract with P&PU and had demanded an accounting. North Western asked for a declaratory judgment that such direct interchange did not violate the contract.

In May 1961, North Western filed an amended complaint alleging it had acquired the assets of Minneapolis and St. Louis Railway Company (M&St.L); that M&St.L had previously directly interchanged with other rail carriers in Peoria and had continued such operations as a division of North Western since the date the latter purchased its assets; that the Interstate Commerce Commission (ICC) had ap-

proved North Western's direct interchange operations with TP&W. The amended complaint further alleged that certain provisions of the contract giving P&PU the exclusive right to perform terminal, industrial and intermediate switching for North Western in and around Peoria were invalid because they violated the Interstate Commerce Act and the antitrust laws of the United States. P&PU filed a counterclaim and an amended counterclaim. In the latter, P&PU sought an accounting and an order enjoining further breaches of the contract by North Western.

The Trustee filed a petition to intervene, alleging the rights of P&PU under the contract had been conveyed as security for a bond issue and that if the contract were found to be invalid, the security would be impaired. The District Court permitted the Trustee to intervene. The Trustee filed an answer, alleging the contract was valid and that North Western was estopped to claim the contract was invalid.

Plaintiff and P&PU each served interrogatories and requests for admissions. Plaintiff then filed a motion for summary judgment alleging certain provisions of the contract constitute a pooling of railroad services which, for lack of approval by the Interstate Commerce Commission under Section 5(1) of the Interstate Commerce Act, violates not only that statute, but also the antitrust laws of the United States.

The Court granted the motion for summary judgment and dismissed the counterclaims of P&PU and the Trustee. The Court later reinstated P&PU's counterclaim and ordered it severed for trial. Judge Mercer filed a detailed and carefully considered opinion which has been published in 201 F. Supp. 241.

Some statement of the background of this controversy seems necessary. Historically, P&PU was organized by certain proprietary railroad lines to handle terminal and

switching traffic in the city of Peoria, Illinois. The rights and obligations of these proprietary lines and of P&PU were defined by a contract dated February 1, 1881. That contract is still in effect and has been extended for a term to February 1, 1981. Illinois Central (IC), Peoria and Eastern (P&E), Nickel Plate, Chicago and Illinois Midland (C&IM) and Pennsylvania are successors in interest to the original proprietary lines and to the rights and obligations under the 1881 contract.

With relationship to Peoria, North Western is a north-south trunk line railroad operating from Chicago to St. Louis, Missouri. Its main line passes westerly of the Peoria city limits and transverses among other places in the Peoria area, Kickapoo Junction, Sommer and Hollis. TP&W is an east-west trunk line railroad. Its line intersects the main line of North Western at or near Hollis.

Prior to March 6, 1957, North Western and TP&W constructed a new track connection between their respective lines at Sommer, located several hundred feet south of Hollis and designed to permit the direct interchange of freight between the two lines. Such interchange was commenced on March 6, 1957 and has since continued. North Western and TP&W obtained approval of construction of the connecting line and of the arrangement for direct interchange of traffic from the Interstate Commerce Commission. F. D. No. 19922.

The controversy before us revolves principally around three clauses of the contract dated December 1, 1911 between North Western and P&PU. The italicized portions of the clauses which follow hereafter were declared unenforceable and enjoined by the District Court. In pertinent part these clauses are:

> "Fourth: [P.&P.U.] shall receive on its tracks and terminal facilities in and near the City of Peoria, all loaded and empty freight and other cars of the lessee intended for transfer by the [P.&P.U.] from and to all

freight houses, warehouses, packing houses, * * * and other industries, and to and from the tracks and warehouses of other railroads with any of which any of the tracks of the said [P.&P.U.] shall at any time be connected, * * *; and *subject to the conditions, reservations and payments hereinafter mentioned and provided for, the said [P.&P.U.] to which is expressly reserved the right to make any and all such transfers,* * *"

"AA * * *. And *all of the loaded and empty freight cars of the said lessee coming into or going out or through said City of Peoria, shall be delivered to the said [P.&P.U.] to be transferred, switched or handled by it* for said lessee; * * *"

"FF * * *; but [P.&P.U.] *hereby reserves to itself* the entire local freight and passenger business between the termini of its main tracks and their connection of the same with the tracks of the said lessee as above provided, and between all other points on its line of railroad, and also reserves *all freight and passenger business that may originate at any point or station on its line of road and be carried to any other point or station on its line of road there to be delivered to some other carrier* or Company, for further carriage; *said lessee shall not participate therein, except* upon such terms as shall be extended to it, * * * and *upon a schedule of rates therefor to be prescribed by said [P.&P.U.]* and to be observed by all Companies using said track, * * *"

North Western emphasizes that the District Court's decree declared the 1911 contract, as extended, void and unenforceable *only* to the extent that it a) reserves to P&PU all rail traffic originating at points upon its lines; b) reserves to P&PU the right to transfer, switch and handle all North Western traffic coming into, or going out of, or through Peoria and vicinity; c) reserves to P&PU the right to establish rates for all traffic originating at all points upon its lines for delivery or trans-shipment at any other point upon its ljnes, and d) requires all trains of North Western entering Peoria must enter over the tracks of P&PU.

The position of P&PU is that the 1911 contract vests

in it an exclusive right to make up and break up North Western trains moving to, out of or through Peoria and vicinity. It asserts the right to handle all cars destined to or from consignees or shippers within the area or destined for interchange with all other railroads with which the lines of P&PU connect. It claims the right additionally to fix the rates to be charged for all freight moving to or from industries, shippers and consignees of freight which are served by its lines.

Plaintiff's position is that it will honor the obligations of its contract and employ the services of P&PU for the interchange of all traffic consistent with its needs and in all instances in which it has no facilities for direct interchange. It contends, however, that North Western and P&PU are competitors in those areas in which North Western lines are directly connected with other railroads as, for example, at Sommer. Plaintiff further insists that the 1911 contract constitutes a pooling of railroad services which has not been approved by the ICC under Section 5(1) and which, for want of ICC approval, is a violation of the Interstate Commerce Act and an unlawful restraint of competition prohibited by the antitrust laws.

The basic issue on this appeal is whether the District Court properly concluded that the course of business conduct required by the three clauses hereinbefore described, constituted pooling of railroad services and traffic; also whether such conduct would be a violation of Section 1 of the Sherman Act (15 U. S. C. Sec. 1).

The Interstate Commerce Act enacted in 1887 specifically prohibited the pooling of railroad freights and revenues. But later amendments including the Transportation Act of 1920 and the Transportation Act of 1940 changed the provision somewhat. At the time of the commencement of this action, the provision prohibits the pooling of freight, services or revenue except where the Commission, granting

specific approval under Section 5 (1) (49 U. S. C. § 5 (1)), finds the public interest will be enhanced by the pooling, and that no unnecessary competitive restraints are involved.

Under the terms of the 1911 contract, North Western is bound to offer no switching service (intermediate or terminal service) in the described area, and to give all this freight and service to P&PU. The District Court stated the matter well in its opinion, 201 F. Supp. 241, at page 254:

> "The provisions of the contract which require plaintiff to deliver to P.&P.U, all traffic destined to industries or other railroads at or near Peoria and Pekin and those which reserve to P.&I .U. all traffic originating or terminating at industries on its line, if valid, would prohibit plaintiff from serving industries accessible to its lines and from establishing interchange connections with any other railroad for its own account. Thus, the contract, in that respect constitutes an agreement not to compete in P.&P.U.'s area of operations in terminal delivery or interchange traffic, and not to compete with P.&P.U. in the matter of soliciting for its own account or fixing rates for traffic moving in the Peoria-Pekin area served by P.&P.U 's lines."

And on page 253:

> "Although none of the cited cases are precisely in point, I conclude that the 1911 contract, as extended, is a pooling agreement within the meaning of Section 5 (1) to the extent that it purports to reserve to P.&P.U. all terminal and intermediate switching service within the Peoria vicinity and to reserve to P.&P.U. all freight originating or terminating on its lines. Plaintiff was a potential competitor of P.&P.U. for such service at all material times. It is now an active competitor in its Sommer operation and in the operation of its M.&St.L. division, competition which forms the basis for P.&P.U.'s present counterclaim."

We agree with the District Court that North Western and P&PU are competitive at Peoria. North Western now interchanges directly with TP&W, Rock Island and Peoria Terminal. This competition stems from North Western's

ability to eliminate switching by the direct interchanges and to use Peoria Terminal for intermediate switching. There is a saving to North Western's customers by this elimination of P&PU's service.

The District Court further stated, page 251: "Unquestionably, upon the pleadings alone and undisputed geographic facts, plaintiff and P.&P.U. are, in fact, competitors in those limited areas where plaintiff has direct access to the lines of other trunk line railroads. In a larger area, which is immaterial to this cause, plaintiff and P.&P.U. are end to end roads and not competitors."

An example of how the public would be hurt by enforcement of the three anti-competitive clauses is demonstrated by the Cilco case. Central Illinois Light Company (Cilco), in 1957, constructed a new coal-burning plant south of Peoria. Cilco insisted that if its rail coal had to be delivered through P&PU, it would abstain from rail delivery since neither P&PU's rates nor service were competitive and that the increase of cost to Cilco's customers would be $101,500 per year.

North Western assumed the obligation of serving the Cilco plant from its right-of-way adjacent to it on the west, and established a connection at Sommer with TP&W, the railroad which served coal mines in a nearby county and which mines produced coal which was suitable for Cilco's use.

A proceeding was had before the Interstate Commerce Commission culminating in authority for North Western and TP&W to serve Cilco from Sommer. P&PU intervened claiming the provision of its 1911 contract precluded North Western from serving Cilco and from interchanging with TP&W except over P&PU's lines. The Commission approved the proposed operation but left the resolution of the contract provisions for disposition in an appropriate court.

In the proceeding, the Interstate Commerce Commission found that switching by P&PU of traffic now interchanged between applicants at Peoria originating or terminating in the industrial area is "inadequate, wasteful, and unnecessary transportation and results in undue delays."

Although the 1911 contract was never approved by ICC under Section 5 (1), P&PU refers to the proceedings of the ICC in 1946 where proceedings were had under Section 5 (2) (49 U. S. C. § 5 (2)). However, the 1946 proceedings cannot be substituted or take the place of proceedings under Section 5 (1). The Commission never made the findings required under Section 5 (1) that the pooling provisions of the joint use contract ". . . will be in the interest of better service to the public or of economy in operation, and will not unduly restrain competition. . . ."

Whatever may have been the case in 1911, at least since 1946 the provisions of the contract hereinbefore described and discussed, constituted a pooling of railroad services. The Interstate Commerce Commission has never been asked to, and never has attempted to authorize such pooling under Section 5 (1) of the Act.

P&PU argues that the terminal railroad business is a substantial industry in its own right and that its needs are paramount. A good answer to such a contention appears in *Greater Baton Rouge Port Commission* v. *United States of America*, 5 Cir., 287 F. 2d 86, 95: "No matter how desirable an agreement may appear, no matter how beneficent the monopoly may appear, Congress has commanded that agreements limiting or destroying competition must first be approved by the [Commission] before they may be lawfully carried out. National policy favors free and healthy competition; monopoly is the exception. . . ."

We also agree with the District Court that the contested provisions of the 1911 contract violate Section 1 of the Sherman Act. If the contested clause of the contract were

sustained, North Western would be required to deliver to P&PU all traffic destined to industries or other roads at or near Peoria and there would be reserved to P&PU all business originating or terminating at industries on its line. It would carve out for P&PU a monopoly of almost all switching traffic in or passing through one of the three great rail gateways in this country. For these competitors to determine among themselves that all this traffic will move by P&PU is a *per se* violation of the Sherman Act. *Northern Pacific Railway Co. et al.* v. *United States*, 356 U. S. 1, 4-5.

P&PU refers to *United States* v. *Terminal Railroad Association of St. Louis* (1912), 224 U. S. 383. In that case, the Government claimed that the acquisition by several proprietary lines of most of the terminal facilities in St. Louis, Missouri, violated the Sherman Act. Although the Court held the joint user arrangement was not unlawful in itself, it ordered the lower court to modify the joint use contract "By eliminating from the present agreement between the Terminal Company and the proprietary companies any provision which restricts any such company to the use of the facilities of the Terminal Company." (Page 411.)

Thus the Supreme Court did condemn under the Sherman Act the restrictive conditions while it approved the basic joint user contract.

We think the claims by the Trustee that North Western is estopped, are without merit. Also, we hold the claim that Section 16 of the Clayton Act (15 U. S. C. Sec. 26) is applicable, cannot be raised at this time.

P&PU also relies upon a decision of this Court in *Parmelee Transportation Company* v. *Keeshin*, 292 F. 2d 794. We do not think the *Parmelee* case is pertinent. Keeshin did not have any contract requiring the railroads not to deal with Parmelee or to refrain from direct interchange

or to require passengers to use Keeshin and not to use other means of transportation. All that was involved in *Parmelee* was joint use by the railroads of the convenient common agent which was similar to the ICC action with reference to the 1946 extension decision hereinbefore referred to.

The judgment of the District Court is

AFFIRMED.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Chicago 10, Illinois.

Monday, August 5, 1963.

Before

Hon. F. Ryan Duffy, Circuit Judge,
Hon. Latham Castle, Circuit Judge,
Hon. Luther M. Swygert, Circuit Judge.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a Corp.,
Plaintiff-Counter-Defendant-Appellee,

No. 13927 *vs.*

PEORIA AND PEKIN UNION RAILWAY COMPANY and ILLINOIS CENTRAL RAILROAD COMPANY, *et al.*,
Defendants-Counter-Claimants-Appellants.

Appeals from the United States District Court for the Southern District of Illinois, Northern Division.

IT IS ORDERED by the Court that the petition for rehearing filed by The New York, Chicago and St. Louis Railroad Company, Peoria and Eastern Railway Company, and Chicago and Illinois Midland Railway Company, defendants-appellants, on May 29, 1963, be, and the same is hereby DENIED.

IT IS FURTHER ORDERED by the Court that the petition for rehearing filed by Peoria and Pekin Union Railway Company and Illinois Central Railroad Company, defendants-appellants, and United States Trust Company of New York, intervener-defendant-appellant, on May 29, 1963, be, and the same is hereby DENIED.

RELEVANT PORTIONS OF STATUTES INVOLVED.

UNITED STATES CODE, TITLE 49, SECTION 5(1).

"Except upon specific approval by order of the Commission as in this section provided, . . . it shall be unlawful for any common carrier subject to this chapter, . . . to enter into any contract, agreement, or combination with any other such common carrier or carriers for the pooling or division of traffic, or of service, or of gross or net earnings, or of any portion thereof; and in any case of an unlawful agreement for the pooling or division of traffic, service, or earnings as aforesaid each day of its continuance shall be a separate offense: *Provided*, That whenever the Commission is of opinion, after hearing upon application of any such carrier or carriers or upon its own initiative, that the pooling or division, to the extent indicated by the Commission, of their traffic, service, or gross or net earnings, or of any portion thereof, will be in the interest of better service to the public or of economy in operation, and will not unduly restrain competition, the Commission shall by order approve and authorize, if assented to by all the carriers involved, such pooling or division, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises. • • •"

UNITED STATES CODE, TITLE 49, SECTION 5(2).

"(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

"(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation . . . or for any carrier, or two or more car-

riers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; . . . or

"(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto."

"(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and . . . shall afford reasonable opportunity for interested parties to be heard. . . . a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: * * *"

"(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include,

other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected."

UNITED STATES CODE, TITLE 49, SECTION 5(8).

"The district courts of the United States shall have jurisdiction upon the complaint of the Commission, alleging a violation of any of the provisions of this section or disobedience of any order issued by the Commission thereunder by any person, to issue such writs of injunction or other proper process, mandatory or otherwise, as may be necessary to restrain such person from violation of such provision or to compel obedience to such order."

UNITED STATES CODE, TITLE 49, SECTION 5(9).

"The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2), or (7), of this section, as it may deem necessary or appropriate."

UNITED STATES CODE, TITLE 49, SECTION 5(11).

"The authority conferred by this section shall be exclusive and plenary, and any carrier . . . participating in . . . any transaction approved by the Commission thereunder, shall have full power . . . to carry such transaction into effect . . . and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so ap-

proved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction."

UNITED STATES CODE, TITLE 49, SECTION 8.

"In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, . . . such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

UNITED STATES CODE, TITLE 49, SECTION 9.

"Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter in any district court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt."

UNITED STATES CODE, TITLE 49, SECTION 13(2).

". . . the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its motion as though it had been appealed to by complaint or petition under any of the provisions of this chapter, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money."

UNITED STATES CODE, TITLE 15, SECTION 1.

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: . . . Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or both said punishments, in the discretion of the court."

UNITED STATES CODE, TITLE 15, SECTION 2.

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *"

UNITED STATES CODE, TITLE 15, SECTION 26.

"* * * *Provided*, that nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity

for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February Fourth, Eighteen Hundred and Eighty-Seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission."

UNITED STATES CODE, TITLE 28, SECTION 2325.

"An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 599

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY,

Petitioner.

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a Corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, PEORIA AND EASTERN RAILWAY COMPANY, and CHICAGO AND ILLINOIS MIDLAND RAILWAY COMPANY,

By JOHN M. ELLIOTT,

Their Attorney.

JOHN M. ELLIOTT,
1401 First National Bank Building,
Peoria, Illinois,
Attorney for Petitioner.

THE DUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. .....

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY,

Petitioner,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a Corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, The New York, Chicago and St. Louis Railroad Company (Nickel Plate), prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered May 14, 1963. Rehearing was denied August 5, 1963.

The Court affirmed a judgment of the United States District Court for the Southern District of Illinois, Northern Division, entered February 19, 1962. (Joint App. 330), made final June 8, 1962. (Joint App. 368, 374.)

The opinion of the Circuit Court of Appeals is reported in 319 Fed. 2d 117.

See copy of opinion in Appendix following.

NATURE OF ACTION.

The action is a declaratory judgment action brought by respondent, Chicago and North Western Railway Company ("C&NW"), based on diversity of citizenship, involving the applicability and validity of the exclusive-dealing provisions of a long-term terminal switching contract between C&NW, a trunk-line railroad, and P&PU, a terminal railroad organized and operated to provide consolidated terminal services for trunk-line railroads at Peoria on nondiscriminatory terms. The District Court found that the contested provisions of the contract are invalid, *per se*, and enjoined their enforcement. The Court of Appeals affirmed the judgment on the same grounds. 319 Fed. 2d 117. (App. 1a.) Rehearing denied August 5, 1963.

See copy of opinion in Appendix following.

OPINIONS BELOW.

The District Court's original opinion (Joint App. below 301), granting summary judgment to C&NW, both on its amendment to the complaint and on the amended counterclaims of P&PU and Trustee, is reported in 201 F. Supp. 241. The same Court's memorandum opinion (Joint App.

368), reinstating P&PU's counterclaim, but otherwise denying petitioners' motion to alter, amend and vacate, is not reported. The opinion of the Court of Appeals and its order denying rehearing are reported in 319 F. 2d 117. (App. 1a, 12a.) Rehearing denied August 5, 1963.

See copy of opinion in Appendix following.

JURISDICTION.

The order of the United States Court of Appeals for the Seventh Circuit denying rehearing was entered August 5, 1963. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

REASONS FOR GRANTING THE WRIT.

Undersigned Petitioner took a strictly neutral position as to the claim made by the P&PU against C&NW that the construction and operation of the Sommer interchange by the C&NW and TP&W is a violation of the contract between the P&PU and C&NW in the District Court and the Circuit Court of Appeals and they maintain the same neutral position in this Court.

Undersigned Petitioner supports P&PU's claim that the contract between the P&PU and C&NW is valid and should be enforced.

Undersigned Petitioner adopts the Petition for Writ of Certiorari, together with Joint Appendix of proceedings in the District Court, and Appendix of proceedings in the Circuit Court of Appeals filed herein by P&PU, Illinois Central, and United States Trust Company, as Trustee of the Peoria and Pekin Union Railway Company, First Mortgage dated January 1, 1950, to the same extent as though the same were copied at length in this Petition, and join in said Petition for Writ of Certiorari and the reasons and basis therein stated, except that they maintain such

neutral position with reference to the construction and operation of the Sommer interchange by C&NW and TP&W.

Undersigned Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered May 14, 1963. Rehearing denied August 5, 1963.

Respectfully submitted,

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY (NICKEL PLATE),

JOHN M. ELLIOTT,

Their Attorney.

APPENDIX.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

SEPTEMBER TERM 1962—APRIL SESSION 1963
Nos. 13927, 13928, 13929, 13930 and 13931

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation,
Plaintiff-Counter-Defendant-Appellee,
No. 13927 v.
PEORIA AND PEKIN UNION RAILWAY COMPANY and ILLINOIS CENTRAL RAILROAD COMPANY,
Defendants-Counterclaimant-Appellants.
CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation,
Plaintiff-Counter-Defendant-Appellee,
No. 13928 v.
UNITED STATES TRUST COMPANY OF NEW YORK, as Trustee,
Intervenor-Defendant and Counterclaimant-Appellant.
CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation,
Plaintiff-Counter-Defendant-Appellee,
No. 13929 v.
CHICAGO AND ILLINOIS MIDLAND RAILWAY COMPANY,
Defendant-Appellant.
CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation,
Plaintiff-Counter-Defendant-Appellee,
No. 13930 v.
PEORIA AND EASTERN RAILWAY COMPANY,
Defendant-Appellant.
CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation,
Plaintiff-Counter-Defendant-Appellee,
No. 13931 v.
THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY,
Defendant-Appellant.

Appeals from the United States District Court for the Southern District of Illinois, Northern Division.

May 14, 1963

(Opinion is reported in 319 Fed. 2d 117.)

Before DUFFY, CASTLE and SWYGERT, *Circuit Judges.*

DUFFY, *Circuit Judge.* Plaintiff, Chicago and North Western Railway Company (North Western) filed this suit for a declaratory judgment against Peoria and Pekin Union Railway Company (P&PU), Illinois Central Railroad Company (Illinois Central), the Peoria and Eastern Railway Company, the New York, Chicago and St. Louis Railroad Company (Nickel Plate), and the Pennsylvania Railroad Company. The United States Trust Company of New York (Trustee) as the trustee under a first mortgage executed by defendant P&PU to secure a bond issue, was allowed to intervene as a defendant and counterclaimant.

This appeal involves the validity of a contract entered into on December 1, 1911 between North Western and P&PU for the use by North Western of P&PU's tracks and facilities in and near Peoria, Illinois, and for switching and terminal services by P&PU for North Western. In 1946, this contract was extended to February 1, 1981.

In its original complaint filed in 1957, North Western alleged it had begun direct interchange with Toledo, Peoria and Western Railroad Company (TP&W) at Sommer, which is located in the vicinity of Peoria, Illinois, and that P&PU had objected and claimed that such operations violated North Western's contract with P&PU and had demanded an accounting. North Western asked for a declaratory judgment that such direct interchange did not violate the contract.

In May 1961, North Western filed an amended complaint alleging it had acquired the assets of Minneapolis and St. Louis Railway Company (M&St.L); that M&St.L had previously directly interchanged with other rail carriers in Peoria and had continued such operations as a division of North Western since the date the latter purchased its assets; that the Interstate Commerce Commission (ICC) had ap-

proved North Western's direct interchange operations with TP&W. The amended complaint further alleged that certain provisions of the contract giving P&PU the exclusive right to perform terminal, industrial and intermediate switching for North Western in and around Peoria were invalid because they violated the Interstate Commerce Act and the antitrust laws of the United States. P&PU filed a counterclaim and an amended counterclaim. In the latter, P&PU sought an accounting and an order enjoining further breaches of the contract by North Western.

The Trustee filed a petition to intervene, alleging the rights of P&PU under the contract had been conveyed as security for a bond issue and that if the contract were found to be invalid, the security would be impaired. The District Court permitted the Trustee to intervene. The Trustee filed an answer, alleging the contract was valid and that North Western was estopped to claim the contract was invalid.

Plaintiff and P&PU each served interrogatories and requests for admissions. Plaintiff then filed a motion for summary judgment alleging certain provisions of the contract constitute a pooling of railroad services which, for lack of approval by the Interstate Commerce Commission under Section 5(1) of the Interstate Commerce Act, violates not only that statute, but also the antitrust laws of the United States.

The Court granted the motion for summary judgment and dismissed the counterclaims of P&PU and the Trustee. The Court later reinstated P&PU's counterclaim and ordered it severed for trial. Judge Mercer filed a detailed and carefully considered opinion which has been published in 261 F Supp. 241.

Some statement of the background of this controversy seems necessary. Historically, P&PU was organized by certain proprietary railroad lines to handle terminal and

switching traffic in the city of Peoria, Illinois. The rights and obligations of these proprietary lines and of P&PU were defined by a contract dated February 1, 1881. That contract is still in effect and has been extended for a term to February 1, 1981. Illinois Central (IC), Peoria and Eastern (P&E), Nickel Plate, Chicago and Illinois Midland (C&IM) and Pennsylvania are successors in interest to the original proprietary lines and to the rights and obligations under the 1881 contract.

With relationship to Peoria, North Western is a north-south trunk line railroad operating from Chicago to St. Louis, Missouri. Its main line passes westerly of the Peoria city limits and transverses among other places in the Peoria area, Kickapoo Junction, Sommer and Hollis. TP&W is an east-west trunk line railroad. Its line intersects the main line of North Western at or near Hollis.

Prior to March 6, 1957, North Western and TP&W constructed a new track connection between their respective lines at Sommer, located several hundred feet south of Hollis and designed to permit the direct interchange of freight between the two lines. Such interchange was commenced on March 6, 1957 and has since continued. North Western and TP&W obtained approval of construction of the connecting line and of the arrangement for direct interchange of traffic from the Interstate Commerce Commission. F. D. No. 19922.

The controversy before us revolves principally around three clauses of the contract dated December 1, 1911 between North Western and P&PU. The italicized portions of the clauses which follow hereafter were declared unenforceable and enjoined by the District Court. In pertinent part these clauses are:

> "Fourth: [P.&P.U.] shall receive on its tracks and terminal facilities in and near the City of Peoria, all loaded and empty freight and other cars of the lessee intended for transfer by the [P.&P.U.] from and to all

freight houses, warehouses, packing houses, * * * and other industries, and to and from the tracks and warehouses of other railroads with any of which any of the tracks of the said [P.&P.U.] shall at any time be connected, * * *; and *subject to the conditions, reservations and payments hereinafter mentioned and provided for, the said [P. &P.U.] to which is expressly reserved the right to make any and all such transfers,* * *"

"AA * * *. And *all of the loaded and empty freight cars of the said lessee coming into or going out or through said City of Peoria, shall be delivered to the said [P.&P.U.] to be transferred, switched or handled by it* for said lessee; * * *"

"FF * * *; but [P.&P.U.] *hereby reserves to itself* the entire local freight and passenger business between the termini of its main tracks and their connection of the same with the tracks of the said lessee as above provided, and between all other points on its line of railroad, and also reserves *all freight and passenger business that may originate at any point or station on its line of road and be carried to any other point or station on its line of road there to be delivered to some other carrier* or Company, for further carriage; *said lessee shall not participate therein, except* upon such terms as shall be extended to it, * * * and *upon a schedule of rates therefor to be prescribed by said [P.&P.U.]* and to be observed by all Companies using said track, * * *".

North Western emphasizes that the District Court's decree declared the 1911 contract, as extended, void and unenforceable *only* to the extent that it a) reserves to P&PU all rail traffic originating at points upon its lines; b) reserves to P&PU the right to transfer, switch and handle all North Western traffic coming into, or going out of, or through Peoria and vicinity; c) reserves to P&PU the right to establish rates for all traffic originating at all points upon its lines for delivery or trans-shipment at any other point upon its lines, and d) requires all trains of North Western entering Peoria must enter over the tracks of P&PU.

The position of P&PU is that the 1911 contract vests

in it an exclusive right to make up and break up North Western trains moving to, out of or through Peoria and vicinity. It asserts the right to handle all cars destined to or from consignees or shippers within the area or destined for interchange with all other railroads with which the lines of P&PU connect. It claims the right additionally to fix the rates to be charged for all freight moving to or from industries, shippers and consignees of freight which are served by its lines.

Plaintiff's position is that it will honor the obligations of its contract and employ the services of P&PU for the interchange of all traffic consistent with its needs and in all instances in which it has no facilities for direct interchange. It contends, however, that North Western and P&PU are competitors in those areas in which North Western lines are directly connected with other railroads as, for example, at Sommer. Plaintiff further insists that the 1911 contract constitutes a pooling of railroad services which has not been approved by the ICC under Section 5(1) and which, for want of ICC approval, is a violation of the Interstate Commerce Act and an unlawful restraint of competition prohibited by the antitrust laws.

The basic issue on this appeal is whether the District Court properly concluded that the course of business conduct required by the three clauses hereinbefore described, constituted pooling of railroad services and traffic; also whether such conduct would be a violation of Section 1 of the Sherman Act (15 U. S. C. Sec. 1).

The Interstate Commerce Act enacted in 1887 specifically prohibited the pooling of railroad freights and revenues. But later amendments including the Transportation Act of 1920 and the Transportation Act of 1940 changed the provision somewhat. At the time of the commencement of this action, the provision prohibits the pooling of freight, services or revenue except where the Commission, granting

specific approval under Section 5 (1) (49 U. S. C. § 5 (1)), finds the public interest will be enhanced by the pooling, and that no unnecessary competitive restraints are involved.

Under the terms of the 1911 contract, North Western is bound to offer no switching service (intermediate or terminal service) in the described area, and to give all this freight and service to P&PU. The District Court stated the matter well in its opinion, 201 F. Supp. 241, at page 254:

> "The provisions of the contract which require plaintiff to deliver to P.&P.U. all traffic destined to industries or other railroads at or near Peoria and Pekin and those which reserve to P.&P.U. all traffic originating or terminating at industries on its line, if valid, would prohibit plaintiff from serving industries accessible to its lines and from establishing interchange connections with any other railroad for its own account. Thus, the contract, in that respect constitutes an agreement not to compete in P.&P.U.'s area of operations in terminal delivery or interchange traffic, and not to compete with P.&P.U. in the matter of soliciting for its own account or fixing rates for traffic moving in the Peoria-Pekin area served by P.&P.U.'s lines."

And on page 253:

> "Although none of the cited cases are precisely in point, I conclude that the 1911 contract, as extended, is a pooling agreement within the meaning of Section 5 (1) to the extent that it purports to reserve to P.&P.U. all terminal and intermediate switching service within the Peoria vicinity and to reserve to P.&P.U. all freight originating or terminating on its lines. Plaintiff was a potential competitor of P.&P.U. for such service at all material times. It is now an active competitor in its Sommer operation and in the operation of its M.&St.L. division, competition which forms the basis for P.&P.U.'s present counterclaim."

We agree with the District Court that North Western and P&PU are competitive at Peoria. North Western now interchanges directly with TP&W, Rock Island and Peoria Terminal. This competition stems from North Western's

ability to eliminate switching by the direct interchanges and to use Peoria Terminal for intermediate switching. There is a saving to North Western's customers by this elimination of P&PU's service.

The District Court further stated, page 251: "Unquestionably, upon the pleadings alone and undisputed geographic facts, plaintiff and P.&P.U. are, in fact, competitors in those limited areas where plaintiff has direct access to the lines of other trunk line railroads. In a larger area, which is immaterial to this cause, plaintiff and P.&P.U. are end to end roads and not competitors."

An example of how the public would be hurt by enforcement of the three anti-competitive clauses is demonstrated by the Cilco case. Central Illinois Light Company (Cilco), in 1957, constructed a new coal-burning plant south of Peoria. Cilco insisted that if its rail coal had to be delivered through P&PU, it would abstain from rail delivery since neither P&PU's rates nor service were competitive and that the increase of cost to Cilco's customers would be $101,500 per year.

North Western assumed the obligation of serving the Cilco plant from its right-of-way adjacent to it on the west, and established a connection at Sommer with TP&W, the railroad which served coal mines in a nearby county and which mines produced coal which was suitable for Cilco's use.

A proceeding was had before the Interstate Commerce Commission culminating in authority for North Western and TP&W to serve Cilco from Sommer. P&PU intervened claiming the provision of its 1911 contract precluded North Western from serving Cilco and from interchanging with TP&W except over P&PU's lines. The Commission approved the proposed operation but left the resolution of the contract provisions for disposition in an appropriate court.

In the proceeding, the Interstate Commerce Commission found that switching by P&PU of traffic now interchanged between applicants at Peoria originating or terminating in the industrial area is "inadequate, wasteful, and unnecessary transportation and results in undue delays."

Although the 1911 contract was never approved by ICC under Section 5 (1), P&PU refers to the proceedings of the ICC in 1946 where proceedings were had under Section 5 (2) (49 U. S. C. § 5 (2)). However, the 1946 proceedings cannot be substituted or take the place of proceedings under Section 5 (1). The Commission never made the findings required under Section 5 (1) that the pooling provisions of the joint use contract ". . . will be in the interest of better service to the public or of economy in operation, and will not unduly restrain competition. . . ."

Whatever may have been the case in 1911, at least since 1946 the provisions of the contract hereinbefore described and discussed, constituted a pooling of railroad services. The Interstate Commerce Commission has never been asked to, and never has attempted to authorize such pooling under Section 5 (1) of the Act.

P&PU argues that the terminal railroad business is a substantial industry in its own right and that its needs are paramount. A good answer to such a contention appears in *Greater Baton Rouge Port Commission* v. *United States of America*, 5 Cir., 287 F. 2d 86, 95: "No matter how desirable an agreement may appear, no matter how beneficent the monopoly may appear, Congress has commanded that agreements limiting or destroying competition must first be approved by the [Commission] before they may be lawfully carried out. National policy favors free and healthy competition; monopoly is the exception. . . ."

We also agree with the District Court that the contested provisions of the 1911 contract violate Section 1 of the Sherman Act. If the contested clause of the contract were

sustained, North Western would be required to deliver to P&PU all traffic destined to industries or other roads at or near Peoria and there would be reserved to P&PU all business originating or terminating at industries on its line. It would carve out for P&PU a monopoly of almost all switching traffic in or passing through one of the three great rail gateways in this country. For these competitors to determine among themselves that all this traffic will move by P&PU is a *per se* violation of the Sherman Act. *Northern Pacific Railway Co. et al.* v. *United States*, 356 U. S. 1, 4-5.

P&PU refers to *United States* v. *Terminal Railroad Association of St. Louis* (1912), 224 U. S. 383. In that case, the Government claimed that the acquisition by several proprietary lines of most of the terminal facilities in St. Louis, Missouri, violated the Sherman Act. Although the Court held the joint user arrangement was not unlawful in itself, it ordered the lower court to modify the joint use contract "By eliminating from the present agreement between the Terminal Company and the proprietary companies any provision which restricts any such company to the use of the facilities of the Terminal Company." (Page 411.)

Thus the Supreme Court did condemn under the Sherman Act the restrictive conditions while it approved the basic joint user contract.

We think the claims by the Trustee that North Western is estopped, are without merit. Also, we hold the claim that Section 16 of the Clayton Act (15 U. S. C. Sec. 26) is applicable, cannot be raised at this time.

P&PU also relies upon a decision of this Court in *Parmelee Transportation Company* v. *Keeshin*, 292 F. 2d 794. We do not think the *Parmelee* case is pertinent. Keeshin did not have any contract requiring the railroads not to deal with Parmelee or to refrain from direct interchange

or to require passengers to use Keeshin and not to use other means of transportation. All that was involved in *Parmelee* was joint use by the railroads of the convenient common agent which was similar to the ICC action with reference to the 1946 extension decision hereinbefore referred to.

The judgment of the District Court is

AFFIRMED.

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SUPREME COURT OF THE UNITED STATES

PEORIA AND PEKIN UNION RAILWAY COMPANY, a corporation, ILLINOIS CENTRAL RAILROAD COMPANY, a corporation, PEORIA AND EASTERN RAILWAY COMPANY, a corporation, CHICAGO AND ILLINOIS MIDLAND RAILWAY COMPANY, a corporation, and UNITED STATES TRUST COMPANY OF NEW YORK, as Trustee of Peoria and Pekin Union Railway Company First Mortgage dated January 1, 1910,

Petitioners,

v.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation,

Respondent.

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY,

Petitioner,

v.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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NOS. 598-599

IN THE

SUPREME COURT OF THE UNITED STATES

PEORIA AND PEKIN UNION RAILWAY COMPANY, a corporation, ILLINOIS CENTRAL RAILROAD COMPANY, a corporation, PEORIA AND EASTERN RAILWAY COMPANY, a corporation, CHICAGO AND ILLINOIS MIDLAND RAILWAY COMPANY, a corporation, and UNITED STATES TRUST COMPANY OF NEW YORK, as Trustee of Peoria and Pekin Union Railway Company First Mortgage dated January 1, 1950,

Petitioners,

v.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation,

Respondent.

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY,

Petitioner,

v.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for The Seventh Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

1. Opinions Below

The opinion of the District Court below on the merits (R. 301-329)[1] is printed at 201 F. Supp. 241. The opinion

1. We so identify citations to the Joint Appellants' Appendix below.

of the Court of Appeals affirming that decision is reported at 319 F. 2d 117.

2. Jurisdiction

The Court of Appeals denied motions for rehearing on August 5, 1963, and petitions for certiorari were filed on November 1, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

3. Questions Presented

In a civil action founded upon diverse citizenship, respondent North Western[2] sought and obtained a declaratory decree that three provisions in its contract with petitioner P&PU[3] purporting to bar North Western from serving industries at or near Peoria, Illinois, were ineffectual. The Court of Appeals for the Seventh Circuit affirmed that judgment, holding that the three provisions in question constituted pooling of railroad services and traffic which, for lack of prior approval by the Interstate Commerce Commission, were unenforceable, and that the three clauses in question also violated Section 1 of the Sherman Act.

As stated by the Court of Appeals:[4]

> The basic issue on this appeal is whether the District Court properly concluded that the course of business conduct required by the three clauses hereinbefore described, constituted pooling of railroad service and traffic; also whether such conduct would be a violation of Section 1 of the Sherman Act, (15 U.S.C. Sec. 1).

2. Chicago and North Western Railway Company.
3. Peoria and Pekin Union Railway Company.
4. Slip opinion at page 5, 319 F.2d 117 at 121.

4. Restatement of the Case

Stated succinctly in the Court of Appeals opinion,[5] this dispute arose when, in 1957 respondent North Western built a short track at Sommer, Illinois, near Peoria, to connect with TP&W[6] (the "Sommer interchange") and to serve certain industries near Sommer with its own trains and switch engines. A proceeding was brought before the Interstate Commerce Commission and the Commission approved this operation (the "*Sommer* case").[7] P&PU objected that the North Western operations proposed at Sommer would violate its contract requiring North Western: (1) to give P&PU all cars requiring transfer to other railroads in the Peoria area; (2) to serve no industries in the area reserved by P&PU for exclusive service; and (3) to keep up rates to the P&PU level in the reserved area.[8] P&PU interjected this claim in the I.C.C. *Sommer* case[9] and then in this District Court suit for declaratory judgment counterclaimed for an injunction and damages against North Western for serving the forbidden area and interchanging freight cars directly to T.P.&W. without using P&PU.[10] P&PU alleged that such conduct violated its contract "for pooling their switching operations. . . ."[11] The I.C.C. in the *Sommer* case left resolution of the contract question for the District Court below[12] and specifically approved the pro-

5. Slip opinion at pages 3-7; 319 F.2d 117 at 119-123.

6. Toledo, Peoria & Western Railroad Company.

7. R. 96-120, (I.C.C. Finance Docket 19922 *Toledo, Peoria & Western RR Co., et al. Trackage Rights, Acquisition, Etc.*, 307 I.C.C. 801, 814).

8. Paragraphs Fourth, AA and FF of the P&PU contract, set out at pages 4-5 of the slip opinion; 319 F.2d 117 at 120.

9. R. 96 at 116.

10. R. 35 at 36, 39-40, *id.* 153, 157, 161-174 (note paragragh 8(g) at page 172).

11. R. 35 at 36, Paragraph (9) lines 16-19.

12. R. 96 at 116.

posed new operation finding[13] as the Court of Appeals below noted,[14] that as to all freight traffic there in question P&PU's service is "inadequate, wasteful, and unnecessary transportation and results in undue delays."[15] Yet it is this same traffic which P&PU seeks to obtain, by the injunction and damages which were sought below.

As to this Sommer business, North Western and P&PU are active competitors. Two courts below have specifically found just this.[16] The contract, if effectual, would bar North Western from serving the area in question, or from interchanging traffic directly with TP&W rather than using petitioner P&PU, as both courts likewise found.[17] Under the "two court rule" it is now too late to challenge these concurrent findings. *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275; *Baker* v. *Schofield*, 243 U.S. 114, 118; cf. *Federal Trade Commission* v. *Standard Oil Co.*, 335 U.S. 396, 400. And, finally, if, as the two courts below concluded, the conduct required by the challenged provisions constitutes pooling,[18] even petitioner admitted[19] (and both courts found as a fact[20]) that I.C.C. has never granted its approval under Section 5(1), without which pooling is unlawful *per se*.

5. Argument—Reasons for Denying the Writ.

A. THE COURTS BELOW PROPERLY FOUND THAT THESE PROVISIONS VIOLATE SECTION 5(1) OF THE INTERSTATE COMMERCE ACT.

First, were the lower courts correct in concluding that

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13. *Id.* 96 at 117-118.
14. Slip opinion at 7, 319 F.2d 117 at 121-122.
15. Slip opinion at 7, 319 F.2d 117 at 122; R. at 113 and 117.
16. Slip opinion at 6-7, 319 F.2d at 122; 201 F. Supp. at 250-251, 253.
17. Slip opinion at 6-7, 319 F.2d at 122; 201 F. Supp. at 253.
18. Slip opinion at 8, 319 F.2d at 122; 201 F. Supp. at 253-254.
19. R. at 157 (Amended Answer of P&PU, paragraph 5a); R. at 122 (Admission 13 by P&PU).
20. Slip opinion at 7-8, 319 F.2d at 122; 201 F. Supp. at 254.

the conduct required by these clauses of the P&PU contract constitutes pooling? If they were, then petitioners' elaborate "supercession" argument,[21] applicable only to the antitrust aspect of the case, is moot.

"Pooling," the Congressional committee which enacted the original Interstate Commerce Act tells us,[22] consists of:

> simply an understanding or agreement among the roads that each shall take a certain proportion of the business of the territory they compete for, and in the event of their not being able to divide the business physically, they equalize the disadvantages by dividing profits.

Petitioners do not challenge the findings made twice below[23] that these provisions

> if valid, would prohibit [North Western] from serving industries accessible to its lines and from establishing interchange connections with any other railroad for its own account. Thus, the contract in that respect constitutes an agreement not to compete in P&PU's area of operations in terminal delivery or interchange traffic and not to compete with P&PU in the matter of soliciting for its own account or fixing rates for traffic moving in the Peoria-Pekin area served by P&PU's lines.

Thus the conduct required by these challenged provisions clearly constituted pooling of competing railroad services. Every circuit which has ever ruled upon this question has

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21. Petition of P&PU at pages 11-18.

22. S. Rep. No. 46, 49th Cong., 1st Sess. Appendix p. 153 (1886); see also *Kennedy* v. *Long Island R.R. Co.*, 319 F.2d 366, 373-374 (2d Cir. 1963), certiorari denied — U.S. — (32 U.S. Law Week 3138), where the quoted language is set out in full, the court explaining (*id.* at 374) that pooling is "an attempt to apportion business among competing railroads on a basis other than individual performance."

23. Slip opinion at 6, 319 F.2d at 121; 201 F. Supp. at 254.

so held. See *Norfolk Southern Bus Corp.* v. *Virginia Dare Transp. Co.*, 159 F. 2d 306 (4 Cir. 1947), *certiorari denied* 331 U.S. 827; *Kennedy* v. *Long Island R.R. Co.*, 319 F.2d 366, 373-374 (2 Cir. 1963), *certiorari denied* — U.S. —, 32 U.S. Law week 3138; and the many cases collected in the district court opinion.[24] I.C.C. decisions likewise compel this conclusion, as the district court also noted, giving considerable weight to the administrative interpretation of the statute.[25]

Petitioner's assertion (Petition of P&PU at p. 18) that "the decision below . . . usurped the [Interstate Commerce] Commission's 'exclusive and plenary' authority . . ." is a glaring misstatement. On the contrary, while I.C.C. could well have approved pooling under Section 5(1) in the 1946 proceeding, no such approval was sought by P&PU or even considered by the Commission (R. 157, 122). Significantly, however, when the question of enforcing these provisions arose in the *Sommer* case, I.C.C. deferred to the district court below for resolution of this issue (R. 116), consistent with its uniform practice of declining to construe or determine the enforceability of contracts.[26]

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24. 201 F. Supp. 241 at 252.

25. 201 F. Supp. 241 at 253.

26. An unbroken series of Entire Commission decisions makes it plain that I.C.C. has no competence to construe, enforce, or hold unenforceable any contracts. In *McArthur Bros.* v. *El Paso & S. W. Co.*, 24 I.C.C. 30, 31 (1915) the Entire Commission held that: "Since only the courts are empowered to enforce [the contract], an expression of opinion by the Commission would be entirely gratuitous, and binding on no one." Again, in *Express Contract, 1920*, 59 I.C.C. 518, 523 (1920) the Entire Commission noted in a pooling contract, "If the contract is entered into and controversies arise between the parties thereto the courts constitute the forum, in which they could and should be adjudicated, and we, therefore, decline to express any opinion with regard to the particular provisions of Article V or any other part of the contract." See also *Gulf, M. & O. RR.—Abandonment*, 282 I.C.C. 311, 331-335 (Div. 4 1952) and *Express Earnings, Plan and Method of Division*, 278 I.C.C. 505, 513 (Entire Commission 1950).

Finally, however, reference of this matter to I.C.C. for approval of pooling for the future would be a useless act, since Section 5(1) requires that a pooling application be "assented to by all the parties involved," and North Western would certainly not assent to these provisions. Therefore, even prospective approval of pooling is impossible. *Escanaba & L. S. R. Co.* v. *United States*, 303 U.S. 315.

The case at this posture is most comparable to a proposed extension of interstate railroad line. Unless I.C.C. first determines whether public convenience requires the extension, the district courts are empowered to enjoin construction until affirmative Commission approval is obtained. The court determines whether the construction constitutes an "extension," just as these courts held that the conduct required by these three clauses was "pooling." *Texas & Pacific Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.*, 270 U.S. 266, 273.

Since the contract had never been presented to I.C.C. for approval under Section 5(1), this pooling was clearly unlawful under the statute, a result ordained by every prior judicial or agency decision and the legislative history of the Act. The lower courts were clearly correct in thus disposing of this question, and no question of significance warrants further review. Thus, on the pooling aspect of the case alone, these many decisions would warrant even summary affirmance of the lower courts here.

B. THE COURTS BELOW PROPERLY FOUND THAT THESE PROVISIONS VIOLATE SECTION 1 OF THE SHERMAN ACT ALSO.

Petitioners rely in the main upon the argument (Petition of P&PU at 11-18) that the Sherman Act (15 U.S.C. 1) has been superseded as to all activities of regulated railroads by some undisclosed provision of the Interstate Commerce Act (49 U.S.C. 1-26), seeking solace in *Pan American World Airways* v. *United States*, 371 U.S. 296. The short answer to this contention is that the Interstate

Commerce Act contains no provision comparable to Section 411 of the Civil Aeronautics Act (49 U.S.C. 1381).[27] Moreover, the *Pan American* decision permits no such inference, since the Court there made it plain (371 U.S. 296 at 304, footnote 9) that it has never held that the 1887 Interstate Commerce Act impliedly repealed the later (1890) Sherman Act as to railroads' activities, citing *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439. The many other decisions squarely in point include *United States* v. *Trans-Missouri Freight Ass'n.*, 166 U.S. 290, 311-315, and *United States* v. *Joint Traffic Ass'n.*, 171 U.S. 505, 573-578, decisions followed uniformly up through *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, and properly applied here, we submit.

Contending that these provisions are simply "exclusive dealing" provisions (Petition of P&PU at 37), petitioners would sweep the findings below under the rug of *White Motor Co.* v. *United States*, 372 U.S. 253, asserting that the lower courts found that "a Trunk Line Railroad Is Always 'Competitive' With a Terminal Railroad (Petition of P&PU at p. 28)."

This beguiling overgeneralization was laid to rest by specific findings of the district court[28] and of the court

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27. Petitioners concede this at page 13 of P&PU's petition.

28. The district court explained (R. 316-318, 201 F. Supp. 241 at 250-251) that:

> At the outset, I had the impression that the question of the competitive positions of plaintiff and P.&P.U. presented a genuine issue of material fact. That impression followed P.&P.U.'s contention that it is a terminal road serving the Peoria gateway and that it does no line-haul business, while C.&N.W. is a line-haul road serving areas northward and southward from Peoria. Thus, P.&P.U. insists that plaintiff and P.&P.U. are end to end roads, complementary to each other and in no real sense competitive.
>
> The first impression was dispelled, however, by an analysis of the pleading in the light of realization that the first impression

of appeals[29] that North Western and P&PU are competitive at Sommer and Peoria, Illinois in the specific circumstances shown by this record.

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stemmed from a generalization of the respective functions of P.&P.U. and C.&N.W. Upon what we may characterize as plaintiff's bread and butter business, the line-haul movement of freight, P.&P.U., as a terminal road operating in the Peoria gateway, is not a competitor of C.&N.W. But the generalization does not apply to terminal service at the gateway because plaintiff's line does not terminate at Peoria. Peoria, on the contrary, is an intermediate point upon a through line from Chicago to St. Louis. The pleadings admit of no doubt that C.&N.W. and P.&P.U. have been potentially competitive in a limited area at all times material to this controversy. Wherever, in the Peoria vicinity, the line of C.&N.W. intersects the lines of other trunk line railroads the direct interchange of traffic between plaintiff and such roads constituted an available alternative to plaintiff's use of P.&P.U.'s services. In fact, prior to March 6, 1957, plaintiff elected to deliver all traffic for local delivery and interchange to P.&P.U. and the potential competition between the two roads remained dormant. With the construction of 519.8 feet connecting track by T.P.&W., plaintiff's dormant competitive position at Hollis and Sommer was converted on that date to actual competition with P.&P.U., with respect to traffic which plaintiff could interchange directly with T.P.&W.

P.&P.U. by its answer, admits that plaintiff does now actively compete with it in that respect. In its counterclaim, P.&P.U. alleges that self-same competition by plaintiff is a violation of plaintiff's undertakings under the provisions of the 1911 contract.

With relationship to competition between P.&P.U. and M. &St. L., P.&P.U. admits by its answer that M.&St. L. for a number of years has conducted direct interchange in Peoria with T.P.&W., Rock Island and other roads in competition with services offered by P.&P.U. It further admits that plaintiff, operating M.&St. L. as a division of C.&N.W., has continued that same competition, and, by its counterclaim, P.&P.U. alleges that plaintiff's continuation thereof is a violation of

Under well settled decisions of this Court, this request to review these two concurrent findings of fact abuses the office of certiorari jurisdiction. *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271; 275; *Baker* v. *Schofield*, 243 U.S. 114, 118. Moreover, since North Western and P&PU were competitive as to this traffic, *White Motor*, dealing with vertical market allocation,[30] is inapplicable, and the lower courts properly relied upon *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, and *Northern Pacific R. Co.* v. *United States*, 356 U.S. 1.

The lower courts properly found Sherman Act violations in the allocation of markets among competitors required by clauses Fourth and FF on the authority of *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593; *United States* v. *Addyston Pipe & Steel Co.*, 175 U.S. 211 and *Northern Pacific, supra*.[31] Likewise, the raw horizontal price fixing

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plaintiff's agreement.

Unquestionably, upon the pleadings alone and undisputed geographic facts, plaintiff and P.&P.U. are, in fact, competitors in those limited areas where plaintiff has direct access to the lines of other trunk line railroads. In a larger area, which is immaterial to this cause, plaintiff and P.&P.U. are end to end roads and not competitors. For example, the two are complementary roads with respect to traffic destined for interchange to and from a majority of the trunk line railroads serving the Peoria area, with whose lines plaintiff has no connection, and with respect to industries served by P.&P.U. which are not also served directly by plaintiff, T.P.&W. or plaintiff's M.&St.L. division.

Upon admitted facts, I find that plaintiff and P.&P.U. do compete for the terminal service market in Peoria and the Peoria vicinity in the areas above indicated.

29. Slip opinion at 6-7, 319 F.2d 117 at 121.

30. 372 U.S. 253 at 261, 263.

31. Discussion and analysis of these decisions is found at 201 F. Supp. 241 at 254.

required by clause FF (requiring North Western to handle any Peoria area business *"upon a schedule of rates therefor to be prescribed by said P&PU"*)[32] was properly held a Section 1 violation on the authority of *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 210 and *Northern Pacific*, *supra*, upon which the district court relied.[33] Finally, the tying of unneeded services found "wasteful and unnecessary" by I.C.C.[34] to P&PU's other necessary terminal services by clauses Fourth and A-A runs squarely against this Court's decision in *United States* v. *Terminal Railroad Ass'n. of St. Louis*, 224 U.S. 383, where a terminal railroad just like P&PU was specifically ordered here (224 U.S. 383 at 411) to amend its contracts with users:

> By eliminating from the present agreement between the Terminal Company and the proprietary companies any provision which restricts any such company to the use of the facilities of the Terminal Company.

Both lower courts found *St. Louis Terminal* dispositive on this element,[35] and could have relied just as well upon *United States* v. *Loew's*, 371 U.S. 38.

Thus this Court, the Interstate Commerce Commission and every federal court which has ever considered provisions such as these has found them unequivocally unlawful, under the Interstate Commerce Act, the Sherman Act, or both. The sole question presented here, then—whether these three provisions in the P&PU contract constitute "pooling" within the meaning of Section 5(1) of the Interstate Commerce Act—has been correctly decided by the courts below. Since no argument advanced in either peti-

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32. Slip opinion at pages 4-5, 319 F.2d at 121.
33. 201 F. Supp. at 254.
34. See page 4 *supra* and R. 117; see also R. 113-115.
35. 201 F. Supp. 241 at 255; Slip opinion at 8-9, 319 F.2d at 123.

tion raises any issue not already well settled by decisions not only of this Court, but by every federal court or agency which has ruled on it, no question is presented of sufficient substance to merit review by this Court.

6. Conclusion

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submited

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Dated: November, 1963

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 598

PEORIA AND PEKIN UNION RAILWAY COMPANY, a corporation, ILLINOIS CENTRAL RAILROAD COMPANY, a corporation, PEORIA AND EASTERN RAILWAY COMPANY, a corporation, CHICAGO AND ILLINOIS MIDLAND RAILWAY COMPANY, a corporation, and UNITED STATES TRUST COMPANY OF NEW YORK, as Trustee of Peoria and Pekin Union Railway Company First Mortgage dated January 1, 1950, *Petitioners*,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation, *Respondent*.

PETITIONERS' REPLY BRIEF.

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vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation, *Respondent*.

PETITIONERS' REPLY BRIEF.

I. NORTH WESTERN'S "RESTATEMENT OF THE CASE."

North Western's recasting of the facts and arguments below is misleading, incomplete and inaccurate.

1. North Western says that P&PU attempted, both before the Interstate Commerce Commission (in *Toledo, P.&W. R. Co.—Trackage Rights Acquisition*, I. C. C. Finance Docket No. 19922, Joint Appendix 96, called by North Western "the *Sommer* case") and in the District Court below, to prevent North Western from serving "certain industries near Sommer with its own trains" on the ground, apparently, that these industries were located in a "for-

bidden area" ("Brief for the Respondent in Opposition," hereafter "NW Brief," p. 3, lines 4, 12, 18).

The statements made as to the existence of a "forbidden area" are without any basis in fact. Apparently North Western is seeking to create the impression that petitioners rely upon Paragraph (FF) of the contract (Joint Appendix 188, lines 9-14), which is the only provision reserving to P&PU "local freight" traffic between points on P&PU's line. P&PU claims no rights under Paragraph (FF) relevant to any issue in this case. Inasmuch as the industries near Sommer are served only by North Western, and have never been served by P&PU, P&PU did not raise Paragraph (FF), either before the Commission in the *Sommer* case* or in this case (P&PU's Answer to North Western's Interrogatory 11; Joint Appendix 146). It did and does rely on Paragraphs Fourth and (AA) (Joint Appendix 146), which advert to intermediate switching between North Western and other trunk lines and industrial switching between North Western and industries served by P&PU.

The "forbidden area" argument, like the "raw horizontal price fixing" argument (NW Brief p. 3), has no basis in the record in this case and serves only to confuse the issue as to whether or not petitioners are entitled to certiorari.

2. North Western has repeatedly, and erroneously, argued that P&PU once characterized the contract as one "for pooling." (NW Brief 3, lines 20-21). The fact is that in answering a complaint alleging only that direct interchange did not breach the contract, validity not being in question, P&PU said: "[P&PU] was conceived and organized by the parties to that [1881] contract . . . for pooling their switching operations . . ." (Joint Appendix 36).

* See testimony of P&PU President Willingham in *Sommer* case, Transcript 701-703, Finance Docket No. 19920, of which we ask this Court to take judicial notice. Mr. Willingham said that P&PU was invoking only Paragraphs Fourth and (AA).

The context reveals that the word "pooling" was used in a non-technical sense, as a synonym for "consolidating," and not as a word of art, as it is employed in section 5(1). Neither of the courts below paid any heed to North Western's effort to gain some advantage from using the quoted phrase out of proper context, nor should this Court.

3. North Western says that "the I.C.C. in the *Sommer* case left resolution of the contract question for the District Court below" as if the Commission there ruled that the pooling question were for the courts. (NW Brief 3, lines 21-23. This idea is more expressly stated in NW Brief 6). The fact is that when the Commission approved construction and operation of the crossover track at Sommer, the only issue then in existence involving the contract was whether "the interchange of traffic at Sommer would be in violation of its agreement. . . ." (Joint Appendix 116). North Western waited until after the Commission had acted to raise the pooling question. It is important to understand just what issue was before the Commission because North Western later argues that the Commission referred to the District Court "the enforceability" of the contract (NW Brief 6), thus confusing the separate questions of breach and validity.

4. North Western says that the courts below made "two concurrent findings of fact" (NW Brief 10) that North Western and P&PU "are active competitors" for North Western's switching traffic to and from TP&W, and that "it is now too late to challenge these concurrent findings," (NW Brief 4). The fact is that in summarily holding that the alternative of self-service rendered North Western a "competitor" of P&PU for North Western's business, the District Court said it based its decision "upon admitted facts" (201 F. Supp. at 251, Joint Appendix 318). As this Court has said: "If the facts are agreed, the question is

one of law" *Texas & P. Ry. Co. v. Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266, 274 (1926). The question of competition thus became a question of law, reviewable here.

5. North Western says that the "I.C.C. has never granted its approval under Section 5(1)." (NW Brief 4). This fact, while true, does not avoid the applicability of this Court's reasoning in *Pan American World Airways v. United States* ("*Panagra*"), 371 U. S. 296 (1963) (see Petition for Certiorari 13-15). North Western's effort (NW Brief 7, second paragraph) to sidestep the issue by referring to proposed extension cases under § 1(18) ignores the crucial difference in statutory law: The Commerce Act gives the courts jurisdiction to enjoin unauthorized extensions "at the suit of . . . any party in interest," see *Texas & P. Ry. Co. v. Gulf, C. & S. F. Ry. Co., supra*, 270 U. S. at 270. North Western has not pointed to any provision of the Commerce Act giving to a court comparable jurisdiction to enjoin unauthorized pooling at the suit of a private party. Compare Section 5(8), 49 U. S. C. § 5(8), which refers only to "the complaint of the Commission . . ."

Moreover, the relevant "fact" is that in 1946 the Commission at North Western's request granted its approval under section 5(2). North Western is in the position of a party which has obtained approval for a transaction in a Commission proceeding and now in this collateral proceeding attacks the basis, terms and limitations of a Commission authorization which it sought and obtained. Such collateral attacks have been uniformly forbidden by this Court, cf. *Andrew C. Nelson, Inc. v. United States*, 355 U. S. 554, 561 (1958).

II. NORTH WESTERN'S SUPERSESSION ARGUMENT.

North Western misstates Petitioners' position as arguing that antitrust law "has been superseded as to all activities of regulated railroads" (NW Brief 7). Petitioners urged only that supersession is co-extensive with regulation, thus preventing head-on collisions between inconsistent philosophies (Petition 14-16).

The decisions cited by North Western demonstrate that this has been this Court's consistent position. Thus, in *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 445 (1945), this court upheld the state's cause of action explicitly because "the relief which Georgia seeks is not a matter subject to the jurisdiction of the Commission." And in *United States* v. *Trans-Missouri Freight Ass'n*, 166 U. S. 290, 314-15 (1897), the Commerce Act was not involved, the court saying: "if the agreement be legal it does not owe its validity to any provision of the Commerce Act and if illegal it is not made so by the Act." *Accord*, *United States* v. *Joint Traffic Ass'n*, 177 U. S. 505, 573-78 (1898). Finally, *Northern Pacific Ry. Co.* v. *United States*, 356 U. S. 1 (1958), involved a railroad's practices in the sale of its noncarrier real estate, a subject well beyond the Commission's purview.

North Western seeks to avoid *Panagra* (NW Brief 8) by pointing to Section 411 of the Aviation Act, 49 U. S. C. § 1381, but to no avail, since it has alleged only unauthorized "pooling" and not "unfair methods of competition." The subject matter of this law suit at its present stage is entirely within the jurisdiction of the Commission, as North Western admits (NW Brief 6: the "I. C. C. could well have approved pooling under Section 5(1) in the 1946 proceeding").

Having conceded this point North Western is forced

into an absurdity, arguing that the "I. C. C. has no competence to . . . hold unenforceable any contracts" (NW Brief 6, footnote 26). This cannot be so. The Commission may not have jurisdiction to decide "contract" questions, but it can authorize acts which breach a contract and thereby eliminate specific performance as a remedy, see *Gulf, M. & O. R. Co.* v. *Illinois Central R. Co.* 225 F. 2d 816 (5th Cir. 1955) (Petition 35). And the Commission can enter a cease and desist order against acts which violate the Commerce Act, even if obedience might involve abrogation of a contract, see *Gallagher* v. *Pennsylvania R. Co.*, 160 I. C. C. 563 (1929), discussed in *Terminal Warehouse Co.* v. *Pennsylvania R. Co.*, 297 U. S. 500, 506 (1936).

The Commission decisions cited by North Western (NW Brief 6, footnote 26) did not involve questions of the applicability of the Commerce Act to the performance of acts in execution of contracts and do not support North Western's innuendo that the Commission has ever abdicated its responsibility to administer the Commerce Act.

North Western argues (NW Brief 7, 1st paragraph) that it would "be a useless act" to refer to the Commission for "approval of pooling." This begs the question, which is whether there is pooling at all. It would not be "useless" to find out what the Commission thinks it did in 1946 when it approved extension of the contract on the same terms as before under section 5(2). Nor would it be useless to find out what the expert agency entrusted in the first instance with administration of the act thinks of the applicability of section 5(1) to the facts of this case. North Western's argument boils down to saying that a plaintiff lacks standing to sue because he might not win.

III. NORTH WESTERN'S POOLING ARGUMENT.

First, North Western (NW Brief 5, lines 2-3) ignores Petitioners' argument that "the question of pooling is . . . reserved in the first instance exclusively for the Commission by the Commerce Act" (See Petition 11, lies 9-11).

Second, the logical inconsistencies of North Western's pooling argument are exposed by comparison of a definition of pooling quoted by North Western and accepted by P&PU (NW Brief 5, lines 5-11) with language from the decision below illustrative of the theory of pooling foisted upon the courts below by North Western (NW Brief 5, lines 12-23).

Pooling involves a sharing or division of a market, with each "partner" enjoying "a certain proportion of the business of the territory they compete for" (NW Brief 5, lines 8-9). But in the contract at issue (according to North Western, NW Brief 5, line 18) North Western agrees "not to compete in P&PU's area" at all.*

Petitioners will not repeat their extended analysis of the limited scope of section 5(1) in the context of the other subsections of section 5 (Petition 22-28). But certainly the decisions cited by North Western contradict its boast that "every circuit which has ever ruled upon this [pooling] question" has held that "the conduct required by these challenged provisions [that is the complete "surrender" of all the business and all the revenue] clearly constituted pooling of competing railroad services" (NW Brief 5). In *Norfolk So. Bus Corp. v. Virginia Dare Transp. Co.*,

* Petitioners do not agree that this is the proper construction of the contract, which delegates to P&PU North Western's switching requirements for its own account, but would not prevent North Western from holding itself out to switch for other carriers for their accounts. Petitioners will assume the existence of a "competitive" relationship, however, for the purposes of this portion of the case.

159 F. 2d 306, 309 (4th Cir. 1947), the agreement in issue was deemed valid on its face, but there was testimony (improperly excluded) showing "that Virginia Dare was to be allocated one-third and Norfolk Southern two-thirds of the net business . . ." for which they had theretofore competed. *Kennedy* v. *Long Island R. Co.*, 319 F. 2d 366 (2d Cir. 1963), held that section 5(1) did not apply to a strike insurance agreement. Similarly North Western can say "I. C. C. decisions likewise compel this conclusion" (NW Brief 6) but it does not and cannot cite any such decisions.

If anything remains clear after North Western's successful effort to convince the courts below that its novel theory of "pooling" can be crammed into the classical mold, it is that there are no decisions which support its theory, that the decision below makes new law, and that it would assist efficient and just administration of section 5(1) were this court to speak on the issue presented.

IV. NORTH WESTERN'S ANTITRUST ARGUMENT.

North Western's main antitrust arguments (NW Brief 10-11) need no further rebuttal because they depend upon the misstatements and half-truths already exposed. For example, North Western's "market division" argument stands or falls on its novel theory of competition. Its "price fixing" argument depends upon a contract provision (Paragraph (FF)) not involved in this case (see Petition 35, footnote). And North Western still argues "tying" despite its inability to show compulsion (see Petition 33).

There is, however, one aspect of North Western's argument which should be noted. It confuses the remedy with the *ratio decidendi* in *United States* v. *Terminal R. Ass'n of St. Louis*, 224 U. S. 383, 411 (1912) and *United States* v. *Loew's, Inc.*, 371 U. S. 38 (1962), by citing these decisions

as "dispositive on this element" (NW Brief 11). In the *St. Louis Terminal* case, this Court did not hold the exclusive dealing provision to be illegal *per se*. This Court did find that flagrant abuse of that and other otherwise legitimate provisions, in furtherance of an anticompetitive conspiracy, tainted the whole arrangement. Faced with a similar problem in *Loew's*, this Court said (371 U. S. at 53):

> Some of the practices which the Government seeks to have enjoined . . . are acts which may be entirely proper when viewed alone. To ensure, however, that relief is effectual, otherwise permissible practices connected with the acts found to be illegal must sometimes be enjoined.

By contrast, in the instant case, there was no mention below of "acts" by P&PU "found to be illegal" and no basis in the record that any such "acts" exist. The District Court completely ignored the necessity for an evidential foundation and struck down the "otherwise permissible" exclusive-dealing provisions in P&PU's contract on a *per se* basis.

This Court has never held that exclusive-dealing arrangements are illegal *per se*, cf. Petition 37, especially *Parmelee Transp. Co.* v. *Keeshin*, 292 F. 2d 794, 803 (7th Cir., 1961). And the Commission has specifically approved exclusive-dealing provisions in the face of attack grounded in antitrust principles, cf. Petition 20, especially *Transfers of Freight within St. Louis and East St. Louis by Dray and Truck for and on Behalf of Railroads*, 155 I. C. C. 129, 140 (1929), discussed and approved by this Court in the connected case of *Central Transfer Co.* v. *Terminal R. Ass'n of St. Louis*, 288 U. S. 469, 471 (1933). The decision below therefore raises an important federal question.

CONCLUSION.

Petitioners submit (1) that the Commission had "plenary and exclusive" jurisdiction over the issues raised by North Western's summary judgment motion, (2) that the decisions below on the pooling and antitrust issues were incorrect and (3) that the decisions below on the issues of jurisdiction and on the merits are in direct and total conflict with applicable decisions by this Court and raise important federal questions. It is urged accordingly that a writ of certiorari to review the decision of the court below be granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 598

PEORIA AND PEKIN UNION RAILWAY COMPANY, a corporation, ILLINOIS CENTRAL RAILROAD COMPANY, a corporation, PEORIA AND EASTERN RAILWAY COMPANY, a corporation, CHICAGO AND ILLINOIS MIDLAND RAILWAY COMPANY, a corporation, and UNITED STATES TRUST COMPANY OF NEW YORK, as Trustee of Peoria and Pekin Union Railway Company First Mortgage dated January 1, 1950,

Petitioners,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 598

PEORIA AND PEKIN UNION RAILWAY COMPANY, a corportation, ILLINOIS CENTRAL RAILROAD COMPANY, a corporation, PEORIA AND EASTERN RAILWAY COMPANY, a corporation, CHICAGO AND ILLINOIS MIDLAND RAILWAY COMPANY, a corporation, and UNITED STATES TRUST COMPANY OF NEW YORK, as Trustee of Peoria and Pekin Union Railway Company First Mortgage dated January 1, 1950,

Petitioners,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

Petitioners Peoria and Pekin Union Railway Company ("P&PU") and United States Trust Company of New York as Trustee of Peoria and Pekin Union Railway Company First Mortgage dated January 1, 1950 ("trustee"), in accordance with rule 58, pray that this Court grant rehearing of its order of January 6, 1964, denying their petition for a writ of certiorari, ____ U. S. ____, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit in the above-entitled case, for the reason that the district court, with only one judge sitting, lacked jurisdiction to enter the order

herein complained of, because the order had the effect of setting aside an order of the Interstate Commerce Commission. The resulting circumvention of the prescribed statutory method of review raises substantial questions affecting the railroad industry generally and the public interest which should be determined by this Court. This reason is substantial and has not previously been presented by petitioners.

I.

In this proceeding a single judge granted a summary judgment in a declaratory judgment proceeding that certain vital provisions of the contract between P&PU and respondent Chicago and North Western Railway Company ("C&NW") delegating C&NW's switching and terminal work at Peoria, Illinois, exclusively to P&PU were invalid as unauthorized and therefore unlawful "pooling" within section 5(1) of the Interstate Commerce Act, 49 U. S. C. § 5(1), and were at the same time restrictions upon C&NW's competitive rights, *per se* unreasonable and violative of section 1 of the Sherman Act, 15 U. S. C. § 1. This judgment and a decree restraining P&PU from enforcing in any way its exclusive right were affirmed by the Court of Appeals for the Seventh Circuit in the face of the following considerations:

(1) In *Chicago & N. W. Ry. Co.—Joint Use*, I. C. C. Finance Docket No. 15354 (1946), the Commission specifically found performance of the P&PU-C&NW contract to be a transaction "within the scope of section 5(2)" (Joint Appendix 91), which refers to "joint use of any railroad line or lines . . . and terminals incident thereto," 49 U. S. C. § 5(2)(a)(ii), and specifically approved the provisions of the contract, necessarily including the exclusive right provisions, as just

and reasonable terms and conditions of the section 5(2) transaction.

(2) The Commission's jurisdiction under both sections 5(1) and 5(2) is made by section 5(11) "exclusive and plenary" and "any carrier . . . participating in . . . any transaction approved by the Commission thereunder, shall have full power . . . to carry such transaction into effect . . . and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction." (49 U. S. C. § 5(11).)

(3) The contract containing the contested provisions had been submitted to the Commission for approval of its extended performance by C&NW itself in a petition filed under section 5(2) and containing as exhibits thereto, the contract and an opinion by C&NW's counsel; that "the proposed transaction meets with the requirements of the law and will be legally authorized and valid, if approved by the Commission" (Joint Appendix 235, 238).

(4) Section 2325 of the Judicial Code, 28 U. S. C. § 2325 provides:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate

Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

(3) Hundreds of contracts for switching and terminal services and for trackage rights containing terms similar to those here involved have been approved by the Commission under section 5(2) without any indication by the Commission or any court, so far as petitioners can discover, that the transactions approved should have been submitted under section 5(1) instead.

II.

Since the Commission has spoken, the single district judge lacked jurisdiction to enter the decree, which had the necessary effect of invalidating and setting aside the 1946 order of the Commission. While the C&NW avoided framing its declaratory judgment petition (as amended) in the form of a request for an injunction against the order, its request for an injunction against enforcing terms and conditions approved by that order amounted to the same thing. Cf. *Venner* v. *Michigan C. R. Co.*, 271 U.S. 127, 130 (1926) and *Lambert Run Coal Co.* v. *Baltimore & O. R. Co.*, 258 U. S. 377, 381-382 (1922).

The holding below that the contested provisions were within section 5(1) was in complete derogation of the Commission's approval as "just and reasonable" and "consistent with the public interest" of all the terms and conditions of the contract, including the contested provisions, under section 5(2). Commission approval extended to the entire contract and precluded the application of section 5(1) to these same provisions.

By enjoining enforcement of a contract right approved

by Commission order, the decree below in effect enjoined enforcement of that aspect of the order itself. The policy behind the carefully-worked out statutory scheme, delegating in the first instance, the questions of "pooling" and antitrust exemption to the Commission and restricting review to a three-judge court, with direct review by this Court, was clearly stated in *Public Service Commission of Utah v. Wycoff*, 344 U. S. 237, 246 (1952) (involving the identical language of 28 U. S. C. 2281):

> . . . the declaratory judgment procedure will not be used to pre-empt and prejudge issues that are committed for initial decisions to an administrative body or special tribunal any more than it will be used as a substitute for statutory methods of review.

Another requirement for direct review of the 1946 Commission order, evaded by means of the declaratory judgment procedure, is that an action to set aside the order would have to have been brought against the United States, 28 U. S. C. § 2322. In such proceedings, the Commission has the statutory right to intervene in defense of its order, 28 U. S. C. § 2323. All these statutory attempts to insure considered review were thwarted by the C&NW's resort to the declaratory judgment procedure in this case.

III.

The decision below jeopardizes hundreds of section 5(2) arrangements long in force and never before in question, and thereby opens the gates to a flood of litigation involving not only terminal joint-use agreements but trackage rights agreements between line-haul carriers as well.

Not every rail terminal in the country may be served by a jointly-owned terminal railroad, as is Peoria, but many terminals are operated under arrangements that restrict the right of the line-haul carriers to interchange directly.

Such arrangements contribute to the efficient operation of railroad terminals and, like the one here at issue, have been approved by the Commission as terms and conditions of section 5(2) transactions. Decisions involving a few of these arrangements were cited in the petition for certiorari, pages 20-21. Moreover, virtually every trackage rights agreement in force limits the entering carrier's right to serve industries on the leasing carrier's line. See petition, page 28. All of these agreements have been approved under section 5(2). Under the theory of the decision below, however, all of these agreements create unauthorized and unlawful pooling.

With respect to rail terminals alone, the validity and enforcibility of these common arrangements, involving millions of dollars of switching revenue and millions of dollars of investment by the public in the bonds of these terminal railroads, is now subject to attack, despite approval under section 5(2). If one opportunist proprietary line employs the decision below as precedent for obtaining a discriminatory advantage over its co-proprietors, it requires little ingenuity to perceive that these other lines will follow suit. The ultimate result will be piecemeal dismemberment for the terminal railroads and defeat for the efforts of the Commission to achieve consolidation at rail terminals.

The prospect of diversion is made more enticing by the fact that (so long as the decision below goes unreviewed) it can be done without resort to the Commission, which is familiar with the application and interrelation of sections 5(1) and 5(2). Instead the proprietary carrier can escape its solemn contractual obligation merely by filing for declaratory judgment with a single federal judge, who may or may not share the Commission's experience and viewpoint. Certainly the courts should not initially seek to coordinate the carriers' conflicting interests with the de-

mands of the National Transportation Policy. And the single-judge court's view of "competition," molded by experience with antitrust law, will not necessarily coincide with that of the Commission. Cf. *Seaboard Airline R. Co.—Merger*, I. C. C. , 1. C. C. Finance Docket No. 21215 (Dec. 2, 1963).

Petitioners respectfully submit that the decision below, bypassing the mandatory procedure set up by Congress for initial administrative action and orderly judicial review, involves important federal questions which should be reviewed by this Court. It is urged accordingly that rehearing of the petition for a writ of certiorari filed herein be granted and that a writ of certiorari to review the decree of the court below be granted.

Respectfully submitted.

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CERTIFICATE OF COUNSEL.

I certify that this petition is presented in good faith and not for delay, and is restricted to a ground specified in rule 58 of this Court.

DONALD G. BESTE.

January, 1964.